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In the Supreme Court of the United States.

OCTOBER TERM, 1898.

ROBERT DUNLAP, APPELLANT,
v.
THE UNITED STATES. } No. 218.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The appellant is a hat manufacturer in Brooklyn, N. Y. Between August 28, 1894, and April 24, 1895, he used 7,060.95 proof gallons of domestic alcohol to dissolve the shellac required to stiffen the hats made at his factory. An internal-revenue tax of 90 cents per proof gallon had been paid upon 2,604.17 proof gallons of this alcohol before August 28, 1894, making $2,344.40, and a tax of $1.10 per proof gallon had been paid upon the remaining 4,456.78 proof gallons after August 28,

1894, making $4,900.81, or $7,245.21 in all. On October 17, 1894, the appellant notified the collector of internal revenue for the first district of New York that he was using domestic alcohol at his factory, and that, under section 61 of the act of August 28, 1894 (28 Stats., 509, 567), he claimed a rebate of the internal-revenue tax paid on the said alcohol, and he requested the said collector to take such official action relative to inspection and surveillance as the law and regulations might require. Subsequently the appellant tendered to the said collector affidavits and other evidence tending to show that he had used the aforesaid quantity of alcohol in his business, together with the stamps showing payment of the tax on the said alcohol, and he requested the said collector to visit the factory and satisfy himself, by an examination of the books or in any other manner, that the alcohol had been used as alleged. The appellant also requested payment of the amount of tax appearing from the stamps to have been paid. The Commissioner of Internal Revenue having announced, on November 24, 1894, under instructions from the Secretary of the Treasury, that no such application for rebate could be entertained, the collector declined to receive the stamps, affidavits, or other evidence.

The Secretary's instructions were issued on the express ground that no regulations under section 61 of the act of August 28, 1894, could adequately protect the Government and honest manufacturers without official supervision, for which Congress had made no appropriation. On the reassembling of Congress in December,

1894, the Secretary brought the matter to its attention in his finance report, and submitted a draft of such regulations as the Commissioner thought necessary, with an estimate of the amount required for their enforcement, which amount he put at not less than $500,000 per annum. Congress made no appropriaton for the purpose, and on June 3, 1896, repealed the section.

In consequence of the collector's refusal to entertain the appellant's application, the latter filed a petition in the Court of Claims for the full amount of the tax which had been paid upon the alcohol used by him as above stated, as shown by the stamps. On December 6, 1897, the court gave judgment that his petition be dismissed, whereupon he took this appeal.

BRIEF OF ARGUMENT.

This case involves the construction of section 61 of the *Act of August 28, 1894* (28 Stats., 509, 567), reading as follows:

> SEC. 61. Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the Treasury of the United States a rebate or repayment of the tax so paid.

THE QUESTION TO BE DECIDED.

The question to be settled is whether the rebate provided for by this section is to be paid upon alcohol used "in the arts or in any medicinal or other like compound," without regard to the conditions under which it is used, or only upon alcohol so used "under regulations to be prescribed by the Secretary of the Treasury." The court below has held that the latter is the use contemplated by the statute, that "the regulations 'to be prescribed by the Secretary of the Treasury' form a part of the affirmative right of the claimant to the rebate," and that "the grant embodies as one of its essential elements such regulations," so that "the want of such regulations can not be supplied by the failure of the Secretary to prescribe reglations." Certainly this view accords with the literal meaning of the words of the statute. The mere use of alcohol "in the arts or in any medicinal or other like compound" had been carried on from time immemorial, and no rebate of the tax had ever, from the inception of our present internal-revenue system, been granted for such use. This section, however, permitted manufacturers to do something which previously they could not do, viz, to use alcohol in the arts or in any medicinal or other like compound, under regulations "prescribed by the Secretary of the Treasury," and on proof of such use, and of the payment of the tax on the alcohol so used, a rebate of that tax was to be made. Clearly the words, taken literally, indicate that the rebate is not to be paid upon the unregulated use of alcohol, but upon its use "under regulations," a use which could only exist under this

section; and it is submitted that this literal meaning of the words is precisely that which Congress intended should be given to them.

Appellant's counsel (Brief, p. 106) contend that "the single question before the court is whether freedom from tax granted by Congress can be defeated by executive inaction," but it is submitted that the real question is very different from this, being, on the contrary, whether a right which Congress has promised shall exist in consequence of the doing of certain things under executive regulation, the necessity of such regulation being manifest, can exist upon the mere doing of these things without executive regulation, Congress having failed to take steps to enable the executive to act in the matter.

REGULATIONS WERE TO BE PRESCRIBED BEFORE ANY RIGHT TO REBATE COULD EXIST.

Taking section 61 literally, as the court below has done, it is clear, in the first place, that it was not intended to take effect immediately, in the sense of applying to all alcohol used in the arts, etc., from the moment that the act containing this section became a law. The use of alcohol to which the section applied was a use under regulations *to be* prescribed. The regulations were not already prescribed, but were referred to as regulations *to be* prescribed—to exist, that is to say, at some future time. Until the regulations existed and were prescribed there could be no use of alcohol under them, and hence no right to rebate. Clearly this would have been the case, even if the regulations had ultimately been prescribed.

It is equally clear, in the second place, that an appreciable time would have had to elapse, even under the most

favorable circumstances, before the regulations could have been prescribed. Had the Secretary of the Treasury been provided, even from the first, with ample funds to employ all the officers needed to enforce his regulations, it is certain that such regulations could not at once have been drafted, nor the necessary officers selected and appointed. In view of the number of establishments to be regulated and the extent of territory to be covered, two or three months, at least, would have elapsed before the Bureau of Internal Revenue would have been in a position to carry out the law all over the country, and justice would have required that it should go into operation everywhere simultaneously, as otherwise some manufacturers would for a time have an advantage over some of their competitors. While it might have been possible for manufacturers to conform to the spirit of the regulations to some extent, even before they were prescribed or enforced, it is evident that the regulations as to supervision, which the Secretary not merely could, but (to judge by the regulations drafted) certainly would have required, could not have been complied with until the necessary officers had been assigned to duty. It can not be contended for a moment that under those circumstances the Secretary would not have been allowed a reasonable time before he could be called upon to prescribe the regulations, or that the right to rebate would have existed as to alcohol used before the Treasury Department was in a position to carry out the law

If, however, it be clear that the law did not give the users of alcohol in the arts, etc., an immediate right to rebate, but only provided for a right to exist in the

future, in consequence of circumstances which could not themselves exist until after an appreciable time had elapsed, it must be equally clear that this was because the existence of the regulations was essential to the existence of the right to rebate, or, in other words, that until the regulations had been prescribed, and the alcohol had been used under them, no right to rebate arose. Hence if, as was actually the case, the regulations never were prescribed, and no alcohol ever was used under them, there never was any right to rebate at all. To concede that the existence of the right to rebate could be delayed, on account of the need of executive action, one day or one hour after the act of August 28, 1894, became a law, is to concede the whole case of the United States. Either section 61 gave to manufacturers using alcohol in the arts, etc., a right to rebate before regulations could have existed, to say nothing of the possibility of enforcing them, or else it gave no such right until they had been prescribed. Either the law gave the right from the first moment that it became a law, without regard to the existence of regulations, or else it made the existence of the right to a rebate to depend upon the prior existence of regulations and upon the use of alcohol thereunder. The first alternative being clearly untenable, the second must stand.

A RIGHT CAN PROPERLY BE CONDITIONED ON PRIOR PERFORMANCE OF AN EXECUTIVE ACT.

There is nothing new or extraordinary in a statute which provides that a right shall come into existence after an executive act is performed, and not before. This

court has more than once ruled upon such a provision. The act of June 12, 1866, section 8 (14 Stats., 60), provided "that when the quarterly returns of any postmaster of the third, fourth, or fifth class show that the salary allowed is 10 per centum less than it would be on the basis of commissions under the act of 1854 fixing compensation, then the Postmaster-General shall review and readjust under the provisions of said section," and in *United States* v. *McLean* (95 U. S., 750), it was held that there could be no increase of salary, though warranted by the quarterly returns of an office, until readjustment by the Postmaster-General. Strong, J., said:

> The law imposes no obligation upon the Government to pay an increased salary unless a readjustment has preceded it; and by the act of 1866 the Postmaster-General is not to readjust an existing salary unless the quarterly returns made show cause for it. Now, if it be conceded that the quarterly returns made on the last day of each quarter, beginning with June 30, 1871, made it the duty of the Postmaster-General to make a readjustment immediately on the receipt of the returns, still his readjustment was an executive act, made necessary by the law, in order to perfect any liability of the Government. If the executive officer failed to do his duty, he might have been constrained by a *mandamus*. But courts can not perform executive duties, nor treat them as performed when they have been neglected. They can not enforce rights which are dependent for their existence upon a prior performance by an executive officer of certain duties he has failed to perform. The right asserted by the claimant rests upon a condition unfulfilled. The judgment was therefore erroneous, and must be reversed.

The same doctrine was applied in *United States* v. *Verdier* (164 U. S., 213), where it was held that under the act of March 3, 1883 (22 Stats., 487), "until the readjustment was made, the law imposed no obligation upon the Government to pay [a postmaster] an increased salary," although the statute directed such readjustment to be made. It is true that in *McLean* v. *Vilas* (124 U. S., 86) it was held that the statute under consideration in *United States* v. *McLean* did not require the Postmaster-General to make a readjustment oftener than once in two years, though in cases of hardship he had discretionary power to do so, but this decision in no way weakens the doctrine of *United States* v. *McLean*, to the effect that until the executive act of readjustment was performed the statute gave no right to an increased salary.

It is submitted that *United States* v. *McLean* and *United States* v. *Verdier* furnish an exact precedent for the judgment of the court below in the present case and that the judgment can not be reversed without overruling those decisions. The appellant asks this court to treat the use of alcohol in his manufactures as if that use had occurred under the regulations of the Secretary of the Treasury, or, in other words, to treat as performed an executive act which, he admits, has not been performed, and to enforce a right dependent for its existence upon a prior performance by an executive officer of certain duties he has (justifiably or not) failed to perform. In point of fact the present case calls for the application of the doctrine of *United States* v. *McLean* and *United States* v. *Verdier* more forcibly than did those cases themselves. The acts to be performed in those

cases were of such a ministerial character that a mandamus could have been issued to compel performance, whereas in the present case the executive act involved such an exercise of discretion that the appellant insists, and apparently with reason, that no mandamus could have been had. If a court can not treat as performed a purely ministerial act required by statute, *a fortiori* it can not dispense with performance of an act involving a wide range of discretion.

REASONS FOR A LITERAL CONSTRUCTION OF SECTION 61—LITERAL INTERPRETATION THE RULE WITH UNAMBIGUOUS STATUTES.

Any attempt to avoid the conclusion that the rebate was granted for a use under regulations only must necessarily involve giving to section 61 some other construction than that warranted by the literal natural meaning of its words, but it is submitted that the section does not admit of any other than a literal construction. The rule of literal interpretation is a primary rule in the construction of statutes and must be adhered to wherever the words of the statute are not ambiguous or uncertain. Thus in *Edrich's Case* (5 Coke, 118a) the act of 32 Henry VIII, Cap. 37, had provided that the person to whom a rent was due *pur autre vie* could distrain for it after the death of the *cestuy que vie*, and it was contended that this was a hardship on the remainderman and inconsistent with another part of the same act, but—

> the judges said they ought not to make any construction against the express letter of the statute; for nothing can so express the meaning of the makers of the act as their own direct words, for *index animi*

> *sermo.* And it would be dangerous to give scope to make a construction in any case against the express words when the meaning of the makers doth not appear to the contrary, and when no inconvenience * will thereupon follow; and therefore in such cases *a verbis legis non est recedendum.*

In *Sturges* v. *Crowninshield* (4 Wheat., 122, 202) it was contended that the constitutional prohibition of State laws impairing the obligation of contracts could not have been intended to apply to such insolvent laws as had been passed by the colonial and State legislatures from the earliest times, although such laws produced the forbidden result. MARSHALL, C. J., however, said:

> Although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of an instrument expressly provide shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if in any case the plain meaning of a provision not contradicted by any other provision in the same instrument is to be disregarded because we believe the framers of that instrument could not intend what they say, it must be

***The word "inconvenience," which, in the time of James I was equivalent to "impropriety," is no less quaint than forcible, for certainly nothing could be more inconvenient, in the modern sense, to an owner of land than to be distrained upon for a rent due by his predecessor.**

> one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would without hesitation unite in rejecting the application. This is certainly not such a case.

Further citation of authority in support of this familiar doctrine would be clearly superfluous, especially as this court has but recently declared itself upon the point in the following words:

> It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. (*United States* v. *Goldenberg*, 168 U. S., 98, 103.)

SECTION 61 AN EXEMPTION FROM TAXATION IN FAVOR OF A SPECIAL CLASS.

In the present case there is not only no reason to suppose that the letter of section 61 did not "fully and accurately disclose the intent" of Congress, but there are several "cogent reasons for believing" that it did. In the first place, as the court below has held, the proposed rebate system would have operated practically as an exemption from taxation, which exemption would not have been general, as where an article formerly taxed is put on the free list, but a special exemption in favor of a certain class of persons using a certain article for certain purposes. The manufacturers using alcohol in the arts, etc., may constitute a large class, but they are by no means all the persons who use it, or even who use it for other than drinking purposes. Grain alcohol is used for

heating and cleansing purposes in every household that can afford it, and would be used for domestic purposes much more widely than it is if the high tax were removed. The abstract right of the ordinary householder to an exemption from tax upon the alcohol used to heat his teakettle or chafing dish, or for other domestic purposes, is precisely of as high a character as that of the manufacturer, and yet the latter alone was favored by section 61, the rest of the community going without relief. The British statute allowing denatured alcohol to be sold free of tax (43 and 44 Vict., c. 24; L. R. Stats., 1880, pp. 174 et seq.) makes no such discrimination, but treats manufacturers and other users of alcohol precisely alike.

The special exemption of manufacturers from the burdens of the spirits tax might have operated indirectly for the advantage of the general public, but so may every exemption from taxation, and this fact constitutes the only ground on which such exemptions can be defended. There is nothing in the character of the rebate system proposed by section 61 to distinguish it in this respect from any other special exemption from the burden of taxation, and hence the case must come within the rule that statutes granting such exemptions are to receive a strict interpretation. (Black on Interpretation of Laws, 322; *Winona and St. P. Land Co.* v. *Minnesota*, 159 U. S., 526.)

This rule is not confined to cases of exemption in favor of a particular individual or corporation. On the contrary, the cases of *State* v. *Mills* (34 N. J. L., 177), *Cincinnati College* v. *State* (19 O., 110), and *Academy of Fine*

Arts v. *Philadelphia Co.* (22 Pa., 496) furnish instances of the application of this rule to statutes affecting whole classes of individuals or of corporations; but even if there were no reported precedent to the contrary, the contention could not stand. The test must be not whether the exemption is in favor of a particular person or corporation, but whether it is special; and if it be not general, it must be special.

SECTION 61 TO BE CONSTRUED WITH REFERENCE TO THE LAWS FOR THE TAXATION OF SPIRITS.

The next reason for a strict construction of section 61 is furnished by its subject-matter. This section was not a complete law by itself, but was one of twenty-one sections relating to the same subject, viz, the taxation of distilled spirits, which twenty-one sections were but a portion of a mass of statute law all relating to this one subject. These sections imposed a higher tax on distilled spirits than that previously imposed, and they introduced certain new requirements in regard to regauging, general bonded warehouses, etc. The intention of these sections, taken together, was evidently to increase the revenue from distilled spirits, other than those used in the arts, etc., but to relieve from taxation (though by an indirect method) such spirits as were so used. That more revenue was desired from spirits used as beverages is just as clear as it is that it was intended to forgo the revenue that had previously been derived from spirits used in the arts, etc., and this fact must be borne in mind in construing section 61.

Moreover, the increased revenue from spirits not used in the arts had to be secured by means of the laws already in force regulating the distillation, storage, rectification, etc., of spirits, so that the provisions of these laws can not be lost sight of in the construction of the new sections. What this court has said in regard to tariff laws is equally true here, that "the whole system must be regarded in each alteration, and no disturbance allowed of existing legislative rules of general application beyond the clear intention of Congress." *Saxonville Mills* v. *Russell* (116 U. S., 13). Practically, the effect of the preexisting laws upon section 61 was the same as if they, except so far as modified by the new sections, had been reenacted along with them, and the general tenor of the whole body of laws regulating the tax on distilled spirits may be said to be this—that they undertake to guard the revenue at every point and require the officers of the United States to certify to the doing of everything that is required to be done and to furnish in official form all the evidence that is called for. As this court recognized in *Felton* v. *United States* (96 U. S., 699, 703), the provisions of the spirits tax law are certainly "stringent."

In the collection of the tax on distilled spirits the Government satisfies itself by its own officers that everything is rightly done, and relies on no unofficial evidence whatever. From the moment that the official storekeeper begins to weigh the grain that is to be placed in a mash tub until the moment (it may be several years afterwards) when the spirits are removed from warehouse on payment of the tax, everything that is done is under the strictest

surveillance, and every known possibility of fraud is guarded against by some official act or record. To contend that Congress intended in section 61 that, in case for any reason the Secretary of the Treasury did not prescribe any regulations for the use of alcohol in the arts, etc., a manufacturer could go ahead and use it, and remove the stamps from the packages and present his claim for rebate, without any official proof of the actual use of the alcohol in the manner in which he claimed that he had used it, is to contend that Congress contemplated a practical nullification of the system of official control over distilled spirits, and the exposure of all the revenue that had been collected by an elaborate and costly system of precautions against fraud to the risk of being paid out again to parties who claimed it under a system that involved no such precautions whatever.

It is therefore clear that the intention of Congress, as expressed in section 61, construed with reference to the whole body of laws regulating the collection of the tax on distilled spirits, was to allow a rebate of the tax upon alcohol when used in the arts, etc., *provided* such rebate could be allowed without risk of loss of any of the revenue which the Government should receive from the tax upon alcohol not so used. The regulations contemplated by the section must have been regulations to insure the *bona fide* use, in the arts, etc., of all alcohol upon which the rebate was paid, and for the prevention of all payment of rebate upon alcohol not so used, and incidentally for the protection of honest liquor dealers against the admission into the market of any beverages composed of or containing alcohol upon which a rebate had been paid.

NECESSITY OF STRICT REGULATIONS IF REBATE WAS TO BE GIVEN.

The reason why the existence of regulations and compliance therewith were made a prerequisite to the right to receive a rebate is found in the peculiar nature of alcohol itself and in the previous experience of the Government in regard to the spirits tax. The annual reports of the Commissioner of Internal Revenue, transmitted to Congress by the Secretary of the Treasury and published to the world, form a history of more or less successful struggles with fraud, the nature of which and the means adopted to prevent it are set out at length in the report for 1875. Such documents as House Report No. 24, Fortieth Congress, second session, and House Miscellaneous Document No. 186, Forty-fourth Congress, first session, give some idea of the ramifications of the notorious "whisky frauds." Apart from the very full information that has from time to time been transmitted to Congress on this subject, it is a matter of common knowledge that the Bureau of Internal Revenue has had to contend with many difficulties in regard to this tax ever since it was first imposed, owing to the fact that the process of distillation is easy and the materials capable of being distilled are plentiful and cheap, so that if the tax, which is several times the value of the spirits distilled, can be evaded, the profit must necessarily be very great.

The teachings of experience have led to the development of a very complete and stringent system of law, under which no confidence is placed in any person, outside the Government service, who has anything to do

with distilled spirits, while it is sought to protect the Government at every point, and many acts are made criminal which in themselves involve no moral turpitude whatever. The law appears to proceed on the very sensible theory that people will be honest as long as it pays them to be so, and that if everything that is done with distilled spirits, from the time distillation begins until the tax is paid, is done under strict surveillance, fraud will be unprofitable, because it will involve the bribery of so many persons and will expose the fraudulent party to so many demands for blackmail.

When, therefore, Congress undertook to provide a system for refunding the tax on alcohol when used in the arts, etc., the strength of the temptation to evade payment of the spirits tax was well known to that body, and it was realized that without the enforcement of such regulations as should effectually protect that portion of the revenue which was derived from the tax on distilled spirits not used in the arts, etc., the loss through fraudulent claims for rebate would be very great. Hence ordinary caution required that no claim for rebate should be allowed until adequate regulations had been prescribed and compliance therewith had been satisfactorily proved. The language used in section 61 is calculated to secure this result, inasmuch as it provides, first, for the use of alcohol "under regulations to be prescribed by the Secretary of the Treasury," and, secondly, for proof of compliance with such regulations and of the use of the alcohol and the delivery of the stamps, while the right to receive a rebate is referred to last, evidently as a consequence

al and dependent upon the existence of the conditions referred to in the earlier portions of the section.

The appropriation acts show that nearly $2,000,000 are annually spent in supervising the business carried on by distillers and rectifiers, besides over $1,000,000 for the work of deputy collectors and revenue agents and the detection of frauds on the revenue. In spite of so large an expenditure and of the completeness of the system pursued (which may be judged of by the regulations in regard to the spirits tax and by the Internal Revenue Manual), attempts to defraud the Government are numerous, and exist in the large cities as well as in the more remote districts. The temptation to divert to purposes not warranted by section 61 the alcohol upon which a repayment of the tax is sought, or to obtain a rebate upon alcohol which has itself paid no tax, is at least as strong as it is to evade the payment of the tax in the first instance; so that the words "under regulations to be prescribed by the Secretary of the Treasury" must have been intended to mean regulations providing for a supervision as complete in its way as is the supervision under which spirits are manufactured. Just what those regulations should provide may be a fair question for argument, but as to the necessity of making them effectual there can be no question whatever. *It would be absurd to suppose that Congress, after appropriating each year over $3,000,000 to secure the collection of the tax on distilled spirits, would authorize the repayment of that tax in the case of spirits used for certain purposes, without so regulating and supervising such use as to make sure that no alcohol, the tax upon which was refunded, should*

be used for any other purposes whatever. Any system under which alcohol could be used free of tax for purposes not within section 61 would not only cause great loss of revenue to the Government, but would also tend to drive honest dealers out of the spirits business altogether, as their tax-paid spirits could not compete in the market with spirits the tax upon which had been refunded. Moreover, no consideration of the advantages of free alcohol in the arts would induce Congress to sacrifice to any large extent the revenue now derived from distilled spirits, so that if it were found that a provision for free alcohol in the arts practically permitted the use of free alcohol for other purposes and seriously cut down the revenue, it would presumably be repealed at once, and hence it was to the interest of the users of alcohol in the arts, as well as of the United States, that the regulation of such use of alcohol be stringent enough to substantially prevent the use of any alcohol whatever free of tax, except only "in the arts or in any medicinal or other like compound," as provided by section 61. From every point of view, therefore, it was essential that the regulations contemplated by section 61 should be effectual to confine the use of the free alcohol to the purposes named in that section, and hence Congress can not have intended to allow any rebate in the absence of regulations.

SUBSEQUENT COURSE OF CONGRESS SHOWS NO INTENTION TO GRANT REBATE IN ABSENCE OF REGULATIONS.

Another reason for a strict construction of section 61 is found in the course subsequently pursued by Congress

in regard thereto. As soon as the act of August 28, 1894, became a law Congress adjourned, but at its very first meeting thereafter the Secretary of the Treasury reported a draft of such regulations as he desired to prescribe, stating at the same time that their enforcement would cost at least $500,000* annually, for which no appropriation was available, and that therefore he could not execute the section until Congress took further action. He also transmitted to Congress the correspondence between himself and the Commissioner of Internal Revenue, including the Secretary's letter of October 6, 1894, instructing the Commissioner to take no action in regard to the matter, an instruction which necessarily forbade him to entertain any claims for rebate. It is therefore manifest that Congress was distinctly informed that no such claims could be entertained unless it took some further action, and of precisely why further action on its part was necessary. The will of Congress was presumably the same in December that it had been the previous August, and had that will been that manufacturers should receive a rebate of the tax on alcohol whether the Secretary prescribed regulations or not, the declaration of the Secretary that he would entertain no claims for

*Appellant's counsel (Brief, p. 70) state that the Commissioner's letter of January 9, 1895, transmitted to Congress, "increased this sum to $1,000,000 in one passage" and "to $10,000,000 in another passage of the same communication," and they base a contention on the apparent inconsistency. This statement of what the Commissioner reported is unfair. The Commissioner mentioned $10,000,000 merely to show what the expense of supervision would be for 32,000 users of alcohol, at the same rate as that previously estimated for the supervision of 1,600, but he then proceeded to show how the cost could be reduced to $1,000,000.

rebate because he could prescribe no adequate regulations which he had the power to enforce would have been a declaration that he would frustrate the will of Congress, and would have met with speedy condemnation at the hands of that body. Legislation would at once have been enacted making it the duty of the Secretary to pay all such claims without regard to the adequacy of his regulations. That Congress, however, silently acquiesced in the Secretary's view is strong proof that he had not attempted to frustrate its will, but had acted entirely in accordance with that will from the first. In other words, the fact that Congress took no steps to require the Secretary to entertain such claims as the appellant's is itself conclusive proof that Congress had originally intended, in adopting section 61, that unless the Secretary found it possible to prescribe and enforce satisfactory regulations, and did so prescribe them, no claims for rebate should be entertained or paid. The only other conclusion to be drawn from the facts is either that Congress changed its mind, between August and December, as to the meaning of section 61, or else that that section did not really express the intention of Congress at all, and that that body availed itself of the Secretary's construction of the law in order to avoid the consequences of a piece of unintentional legislation. Neither of these alternative conclusions, however, is permitted by any doctrine of statutory construction, every statute being presumed to express the intention of the enacting body, and the mind of that body being always presumed to be consistent with regard to any statute, at least as far as concerns its meaning.

Both the action and the inaction of Congress, after it had received the Secretary's report, clearly indicate an intention that inasmuch as section 61, if carried into operation, would involve the appropriation of a considerable sum, it should not be carried out. The deficiency appropriations for the work of the Internal Revenue Bureau for the year 1894–95 were trifling in amount (except as to the income tax) and specifically limited in application, while the appropriations for that work for the year 1895–96 were no greater than for the previous year, except where certain additional work was specifically provided for. Finally, on June 3, 1896, Congress repealed section 61 altogether and authorized the appointment of a joint select committee to "consider all questions relating to the use of alcohol in the manufactures and arts free of tax, and to report their conclusions to Congress," with power to summon witnesses, administer oaths, print testimony, etc. (29 Stats., 195.)

Congress could not have put itself on record much more effectually than it has done as agreeing with the Secretary that the section could not be carried out. That it did not sooner repeal the section is presumably due to the fact that it at first considered that no repeal was necessary, the act simply remaining inoperative until the requisite appropriation should be made, but that finally, being informed by the Attorney-General in December, 1895, of the number of suits that were being brought in the Court of Claims under that section, it realized the desirability of putting a stop to all further misconception of its position. The appointment of a special committee

to make a thorough investigation of the whole matter is also some evidence that Congress held that, besides the lack of an appropriation, the use of alcohol in the arts free of tax had not been adequately provided for in section 61, and that the matter was one that needed to be dealt with only after the most thorough investigation.

CONTRAST FURNISHED BY ACTION OF CONGRESS IN REGARD TO THE INCOME TAX.

The action of Congress as to section 61 is in striking contrast with its action as to section 9, where the expense of supervising the manufacture of goods from tax-free materials for export was carefully provided for, but it is in still more striking contrast with its action in regard to sections 27 to 36, which imposed an income tax. As originally passed, these sections, involving the employment of a number of additional deputy collectors and agents, made no provision for paying them, leaving the Secretary of the Treasury in this respect practically, though not legally, in the same position that he occupied as to section 61. The necessary office work could lawfully have been done under the appropriation for the Commissioner's office, and as the work to be done by collectors, deputy collectors, clerks, and agents throughout the country was for "collecting internal revenue," the force then employed could lawfully have been used to collect the income tax, but practically, as that force was already fully employed, and there was no authority to employ additional men, nor any money to pay them, an appropriation was just as necessary as for the purposes of section 61. To supply this need the Secretary of the

Treasury, in his estimate of urgent deficiencies, transmitted to the Speaker of the House of Representatives, December 4, 1894, stated that in order to collect the income tax during the six months ending June 30, 1895, $15,295 were needed for increased force in the office of the Commissioner of Internal Revenue, $211,800 for deputy collectors, and $18,000 for agents. (See Rec., 21.) These needs were supplied by the urgent deficiency bill of January 25, 1895 (28 Stats., 637), but until that appropriation was made little could be done to carry the income tax sections into effect without seriously hampering the other work of the Bureau, and it is matter of history that the joint resolution of February 21, 1895 (28 Stats., 971), prolonging by six weeks the time for making returns, was made necessary by the delay in making the appropriation.

This action in regard to the income tax is a very strong indication of the intention of Congress that section 61 should not be carried into effect during either the fiscal year 1894–95 or that of 1895–96. To start the operation of the income-tax sections, no new item of appropriations was required. All that was needed was an increase of appropriations already made, in order to enable the new tax to be collected without interfering with the collection of the taxes previously authorized; and that increase was voted in due season. With section 61, on the contrary, nothing could be done, beyond the drafting of regulations in order to be ready to carry out the law when Congress should supply the means to do so; and Congress supplied no such means. Its inaction was not fortuitous, but intentional.

ABSENCE OF A FORMAL ESTIMATE IMMATERIAL.

Appellant's counsel contend, however (Brief, p. 70), that "no conclusion unfavorable to the continued force of the law can be drawn" from the failure to make appropriations for it, and this because "no formal estimate" of such an appropriation "was ever submitted by the Department." This contention is extraordinary, in view of the well-known practices of Congress. The act of July 7, 1884, § 2 (23 Stats., 236, 254), referred to in support of the contention, is intended to govern the Secretary of the Treasury, and not Congress itself. The former's failure to include an estimate for the expenses under section 61 in his deficiency estimate was possibly due to the fact that he did not believe that Congress, when once informed of the expenditure required, would make any appropriation. Possibly, also, he considered the data at his command inadequate for the framing of an estimate according to the accepted standard of accuracy. Be this as it may, he gave Congress the benefit of all the data then before him, and soon afterwards promptly responded to a call for further information (Sen. Ex. Doc. No. 34, 53d Cong., 3d sess.), and the inaction of Congress loses none of its significance by reason of the particular way the information as to the need of an appropriation was communicated.

That appropriations are largely based on the Treasury estimates is true, but it is equally true that special estimates are called for from time to time, and also that very large sums are often added to appropriation bills without any Treasury estimate at all; and the contention that

Congress intended that section 61 should be carried out, with all the expenditure necessary for that purpose, but failed to make the appropriation because it was officially informed of the need of it in one way rather than in another, is wholly without foundation.*

CONTRAST FURNISHED BY ACTION OF CONGRESS IN REGARD TO SEED DISTRIBUTION.

Were further argument needed to prove that the inaction of Congress in regard to alcohol in the arts, after receipt of the Secretary's finance report, manifests the concurrence of Congress in his view of section 61 and in the course which he pursued in regard thereto, it would be found in contrasting this inaction with the action of the same body in an instance of nonconcurrence with the conclusions of an executive officer. In his report for 1895 (House Doc. No. 6, Fifty-fourth Congress, first session) the Secretary of Agriculture called attention to "the needlessness and folly of the annual, gratuitous, and

* Appellant's counsel (Brief, p. 70) further assert that the correctness of their position—

> is shown by the fact that a proposition in the Senate to make an appropriation for this very purpose was laid on the table on the precise ground that no Treasury estimate had been submitted for it. (Cong. Rec., 53d Cong., 3d sess., part 2, page 1027.)

In view of the decision in *United States* v. *Trans-Missouri Freight Association* (166 U. S., 290, 316), no such reference to the debates in Congress is permissible; but were this otherwise it would be found that the above statement is incorrect; it would be seen that the proposed appropriation was tabled, not because there was no estimate, a matter which was only referred to incidentally, but because section 61 could not be carried into effect without "some additional legislation."

promiscuous distribution of seeds deadheaded through the United States mails," and stated that as he had received no satisfactory bids for supplying for distribution such rare and uncommon seeds and valuable trees, plants, shrubs, vines, and cuttings as he considered the law required, he had made no distribution of seeds, trees, etc., for the fiscal year 1895–96, so that the appropriation of $130,000 for the purchase and distribution of seeds, etc., was "entirely intact and consequently undrawn from the Treasury of the United States." Instead of silently acquiescing in the Secretary's course, though backed by arguments of no small weight, Congress promptly resolved—

> That the Secretary of Agriculture be, and he is hereby, authorized and *directed* to purchase and distribute valuable seeds for the year eighteen hundred and ninety-six, as has been done in preceding years; and * * * the Secretary of Agriculture is hereby *directed* to procure them by open purchase or contract at the places and in the manner in which such articles are usually bought and sold. * * * (29 Stats., 467.)

Moreover, in making appropriations for the Department of Agriculture for the next fiscal year, Congress increased the appropriation for seeds, etc., by $20,000 over the previous appropriation, adding the significant words—

> And the Secretary of Agriculture is hereby authorized, empowered, *directed*, and *required* to expend the said sum in the purchase, propagation, and distribution of such valuable seeds, bulbs, trees, shrubs, vines, cuttings, and plants, and is authorized,

empowered, *directed*, and *required*, to expend not less than the sum of one hundred and thirty thousand dollars in the purchase at public or private sale of valuable seeds, the best he can obtain, and such as are suitable to the respective localities to which the same are to be apportioned. * * * (Act of April 25, 1896; 29 Stats., 99, 106.)

Besides directing and requiring the Secretary to distribute the seeds, etc., Congress amended section 527 of the Revised Statutes so as to make it conform in terms to the loose construction that had for some years been put upon it, and which the Secretary had condemned in his report.

Whatever be thought of the wisdom of Congress in the matter of seed distribution, its action in 1896 clearly shows that that body does not hesitate to assert and enforce its views of the law in the most effectual way when such views are controverted and the Congressional intention thwarted by an executive officer. In any conflict between the legislative and executive branches of the Government the former has never shown any disinclination to maintain its position at all hazards, and there is no reason to suppose that the Fifty-third Congress was any more ready to surrender its convictions than any of its predecessors or successors have been. When, therefore, a statute calls for action by an executive officer, and he reports that such action is impracticable until Congress takes further steps, and that in the meantime the law must remain inoperative, and Congress does nothing further, the conclusion is irresistible that the understanding of Congress as to the operation of the law is and was

all along the same as that of the Executive, and that it did not intend, even at the time that it enacted the law, that it should go into practical effect unless the Executive took such action as its provisions called for.

CONTRAST BETWEEN LANGUAGE OF SECTION 61 AND THAT OF THE DRAWBACK LAWS.

The language of section 61 is in striking contrast to that of sections 3015, 3019, 3026, 3329, and 3386 of the Revised Statutes in regard to drawback, which provide, in the first place, that a drawback shall be allowed; and, secondly, that it shall be ascertained under such rules and regulations as may be prescribed; whereas section 61 provides first for the use of alcohol under regulations, before any words are used indicating an intention to grant a rebate. This difference in the wording of the statutes is very far from being "a mere verbal difference," as appellant's counsel contend (Brief, p. 55), but is necessitated by the fundamental differences in purpose and object.

Drawback laws are concerned solely with what is done with an article, *after* its manufacture, without any regard to the process of manufacture whatever. The mere use of imported material in manufacturing does not entitle the manufacturer to a drawback, and hence the drawback laws do not undertake to regulate any manufacturing business. It is only when the manufactured goods are exported, when that which has been brought into the country is taken out of it (in a different form, it may be, but the same substance), that a reason for a repayment of duty arises. In such cases all that requires regula-

tion is, first, the exportation itself, which is regulated primarily by statute (R. S., §§ 3078–3077, and the several amendments thereof), and secondly, the ascertainment of the character and quality of the imported materials existing in the manufactured article; and the decision in Campbell v. United States (107 U. S., 407), upon which the appellant seeks to rest his case, and which will be discussed more fully below, is concerned solely with regulations as to this second matter.

The right to drawback is undoubtedly conditioned upon compliance with the statutes regulating exportation, and if they are complied with it is comparatively unimportant how the quantity of imported material that is exported is ascertained, provided it be done correctly, and hence there was no need of conditioning the right to drawback upon compliance with regulations in regard to such ascertainment.

Section 61, on the contrary, is concerned solely with manufacturing, without any regard to what is afterwards done with the manufactured article, except that in certain cases it would be necessary to so regulate the processes of manufacture as to make subsequent recovery of alcohol from the manufactured article impracticable. The rebate was not granted for the quantity of alcohol existing in a manufactured article (as the drawback is granted for the quantity of imported material existing in the exported article), but on account of the use of alcohol in manufactures as distinguished from its use as a beverage, or, in other words, on account of the manufacturing, and hence it was the manufacturing which required regulation. To insure compliance with the

regulations of manufacture in all cases in which a rebate was to be claimed, the rebate was granted for a regulated manufacturing only, and, there having been no regulated manufacturing, there can be no rebate. Hence, a vital difference exists between the present case and the drawback cases, where the regulations did not concern the matter for which the drawback was granted (i. e., the exportation), but only a purely ancillary matter of proof. To say, as appellant's counsel do (Brief, p. 55), that the regulations required by section 61 "are simply designed to ascertain the quantity of "alcohol used in manufactures and medicines," is to misconstrue the intention, as well as the language, of the section; but even if the regulations contemplated by section 61 had to do merely with the ascertainment of the quantity of alcohol used, this would be very different from the ascertainment of the quantity existing in the manufactured article, as in the case of a drawback.

The right to rebate under section 61 is clearly made the consequence of the use under regulations. The words "under regulations to be prescribed by the Secretary of the Treasury" impose an express condition upon that use of alcohol which is to entitle the user to receive a rebate. This is a case where the maxim *expressio unius est exclusio alterius* manifestly applies. The precise application of this maxim depends, of course, upon the language and the circumstances of each case; but the general conclusion from the authorities has been stated to be that this maxim "was never more applicable than when applied to the interpretation of

*a statute" (Broom's Leg. Max., 8th ed., p. 664); while another writer has pointed out that "it is particularly applicable to the construction of such statutes as create new rights or remedies * * * or otherwise come under the rule of strict construction." (Black, Interp. of Laws, 147.)* It has already been shown that section 61 *necessarily comes "under the rule of strict construction,"* and that it does so because it *creates* new and *exceptional rights*; so that the words "under regulations to be prescribed" must be understood as imposing an express and exclusive condition, equivalent to what would be expressed by the words "*if* any manufacturer, finding it necessary to use alcohol in the arts, shall use the same under regulations to be prescribed by the Secretary of the Treasury."

To contend that section 61 was intended to provide for a rebate if, owing to the fact that no regulations had been prescribed, the alcohol was not used "under regulations," practically involves a change in the language of the section, a construction which would treat it as if it read thus:

> Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, *if he prescribe any, but if he do not, then the manufacturer may use alcohol without being subject to any regulations whatever*, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations, *in case they shall have been prescribed*, and has used such alcohol therein, etc.

The words above inserted (and which *must* be read into the section if a literal construction is to be abandoned) wholly destroy the effect of the provision which Congress expressly adopted, thereby utterly disregarding the rule as to *expressio unius*. Whatever be the limits of the application of that rule, one thing is certain, viz, that in the construction of statutes nothing can be implied which is at variance with what is expressed. Provisions that something may be done "under regulations to be prescribed" and that it may be done under regulations, if prescribed, but otherwise without regard to regulations, are clearly at variance, since the plain meaning of the first is that there must be regulations in order to allow of the thing being done, or, at least, to allow of the desired consequences attaching.

According to the plain meaning of section 61, therefore, the regulations must first be prescribed, and the manufacturer who wishes to obtain a rebate must use his alcohol under those regulations, before he can make his proof of such use to the collector, while the collector must be satisfied that the regulations have been complied with, as well as that the alcohol has been properly used, before the manufacturer can have any right to a rebate of the tax represented by his stamps. This section does not itself grant an absolute right to any manufacturer or class of manufacturers to receive a rebate, but makes the whole matter dependent upon the issuance of regulations by the Secretary, and upon the use of alcohol under such regulations.

THE REQUIREMENT THAT REGULATIONS MUST FIRST BE PRESCRIBED INVOLVED NO DELEGATION OF LEGISLATIVE POWER.

While it is perfectly true that the right of a manufacturer to rebate under section 61 is "fixed by statute and not by regulation," yet as the statute requires the manufacturing to be done "under regulations," in order that the right may exist, it is the statute itself which postpones the existence of the right until the Secretary of the Treasury has performed the act called for by the statute, viz, the prescribing of regulations. As already shown, the statutes passed upon in *United States* v. *McLean* (95 U. S., 750) and *United States* v. *Verdier* (164 U. S., 213) required an executive act to be performed before the rights granted by those statutes could exist. Another class of statutes bearing considerable resemblance to section 61 are those which provide that they are to go into effect, or to take effect in one way rather than another, upon the happening of certain contingencies, the existence of which is to be ascertained by the Executive. That such acts do not involve any delegation of legislative power was decided in *Brig Aurora* v. *United States* (7 Cranch, 382), and the law on this subject is considered at length in *Field* v. *Clark* (143 U. S., 649, 680–694), where a provision was under consideration which in effect required the President to examine the commercial regulations of other countries producing and exporting sugar and certain other articles and *form a judgment* as to whether or not they were reciprocally equal and reasonable in their effect upon American products,

and that if he deemed the regulations of any such country to be reciprocally unequal and unreasonable he should proclaim the fact, and thereafter the duties upon the sugar and other specified articles of such country should be levied at certain rates, which were higher than those at which similar imports from other countries were taxed. It was there held that such a provision did "not, in any real sense, invest the President with the power of legislation," but merely with the ascertainment of certain facts. In the ascertainment of those facts the President necessarily exercised his judgment and discretion to decide what were and what were not reciprocally unequal and unreasonable regulations, and according to his decision in any case the higher rate of duties would or would not take effect, but that involved no exercise of legislative power.

Although in section 61 Congress did not in so many words enact that the rebate provision should only take effect in case the Secretary ascertained that effective regulations could be enforced by him with the power then at his disposal, yet practically this was precisely what was done. Congress desired to relieve manufacturers from the tax levied upon the alcohol which they used in the arts, etc., but it did not wish to risk losing any of the tax upon alcohol not so used, and hence it required the Secretary of the Treasury to first prescribe regulations adequate for the attainment of this double purpose. The first effect of this requirement was simply to call upon him to ascertain whether he could, by any regulations which he then had the power to enforce, restrict the proposed rebate upon alcohol within the limits desired by

Congress. The existence of power on his part to enforce such regulations as would restrict the use of free alcohol to the purposes contemplated by Congress was the fact which the Secretary was to ascertain, just as in *Field* v. *Clark* the existence of reciprocally unequal and unreasonable regulations was the fact which the President was to ascertain. Judgment and discretion had to be exercised in both cases, and in both cases the existence of the fact which had to be ascertained was necessarily more or less a matter of opinion. Even if it might be shown that in the one case the question to be settled was more complicated and difficult than the other, and involved a greater exercise of judgment in reaching a conclusion, this would constitute a difference of degree between the two cases, but not one of kind.

Some of the acts cited in *Field* v. *Clark* to illustrate the doctrine there upheld bear a remarkably strong analogy to section 61. The acts in regard to the importation of neat cattle and hides, beginning with that of March 6, 1866 (14 Stats., 3), have always provided that whenever the Secretary of the Treasury determined, as to cattle from any particular country, that such importation from that country would not lead to the introduction or spread of contagious or infectious diseases among the cattle of the United States, and proclaimed the fact, the importation from such country should be allowed. Whether the importation of cattle and hides from any given country would be safe or not must always be a question of opinion to be decided by the Secretary according to his best judgment, and whether such regulations as the Secretary could enforce as to the use of

alcohol in the arts would be effective or not is a similar question of opinion. If, as this court evidently considered, it involved no delegation of legislative power to make the right to import cattle and hides depend on what the Secretary, in his judgment, should decide, it would seem equally permissible to make the right to a repayment of the alcohol tax dependent upon the Secretary's decision as to what was feasible.

REASONS FOR RESTRICTING THE REBATE TO CASES OF USE UNDER REGULATIONS.

History of section 61.

The restriction of the rebate to cases of use under regulations, though virtually making the operation or nonoperation of section 61 depend upon the ascertainment of a fact by the Secretary of the Treasury, was warranted by the circumstances of the case. The laws in regard to the tax on distilled spirits constitute, as already stated, a very complete and detailed code, which is carried out by a very elaborate system of regulations, and it is clear that Congress did not intend to weaken the effect of these laws and regulations in general, or to modify them in any way except in so far as might permit of the use of alcohol in the arts, etc., free of tax without detriment to the revenue from the tax upon spirits used for all other purposes. The problem was *how* to permit it.

That Congress held this to be a serious problem is shown by the history of previous attempts to secure free alcohol for use in the arts. A bill to provide for this was introduced in 1882, and the subject was discussed, but no conclusion reached. (13 Cong. Rec.,

5325, 5360–5364.) Other similar bills were introduced in 1886, but seem not to have been reported on by any committee. (17 Cong. Rec., 341, 394, 582.) A report on the subject was made by the Senate Committee on Finance at the second session of the Fiftieth Congress (Sen. Doc. No. 2332), and a bill to provide for the use of alcohol in the arts, etc., free of tax was inserted by the Senate at that session in House bill No. 9051, the well-known "Mills bill," but failed to pass the House. The very day before section 61 was offered as an amendment to the act of which it became a part, a much more elaborate amendment to provide a system for the use of alcohol in the arts, etc., free of tax was proposed and rejected. (26 Cong. Rec., pp. 6935–6936.) Comparing the rejected amendment with section 61, it will be seen what the Senate was willing to enact and what it was not willing to enact. The rejected amendment provided for bonded alcohol warehouses, the removal of alcohol therefrom to storerooms connected with manufactories, the keeping of alcohol in such storerooms in charge of a revenue officer, its removal and use subject to supervision, its methylation, etc. Bearing in mind that when the Senate rejected these provisions and adopted section 61 it could not have intended to run any risks as to the revenue from the tax on spirits not used in the arts, etc., or to open any doors for fraud on the revenue or on the liquor dealers, it is clear that it could not have rejected the provisions first presented to it because it considered them too strict, but because it considered that the experiment of allowing the use of alcohol

in the arts, etc., free of tax could be tried more satisfactorily if the whole matter were left to the Secretary of the Treasury to regulate than could be done if Congress undertook to provide one rigid system and confine the Treasury and the manufacturers to that. The Secretary's regulations were to take the place of the statutory enactments that were proposed and rejected, and compliance with the former was to be just as essential to the existence of a right to a rebate as compliance with the latter would have been had they been adopted.

If it be urged that this was an unusual course for Congress to pursue, the explanation lies in the unusual circumstances of the case. A radically new measure was to be tried, all over the country at the same time, in regard to a matter which required the utmost care and precaution in dealing with it, as any looseness of method would not only expose the Government to enormous losses, but would put all honest dealers in spirits at the mercy of unscrupulous persons. Under these unusual circumstances, Congress not unnaturally preferred not to hamper the experiment by any regulations which could not be altered without further Congressional action, but to leave the whole matter to the Secretary of the Treasury, to be regulated by him in accordance with his best judgment, or to be left alone if the Secretary considered that without the exercise, on his part, of powers which Congress had not yet seen fit to give him, the experiment could not safely be tried at all.

The provisions of section 61 are very different from those of the bill introduced in 1882, but not passed, providing that the Secretary of the Treasury should grant

permission to any firm, individual, or corporation to withdraw alcohol from bond, free of tax, "for the sole purpose of use in industrial pursuits, under such rules and regulations as the Commissioner of Internal Revenue may prescribe, with the approval of the Secretary of the Treasury." (13 Cong. Rec., 5325, 5360.) That bill proposed to give manufacturers a right to receive the alcohol and to permit the Commissioner to prescribe regulations, but did not make the right to receive the alcohol dependent upon any regulation whatever. It was, of course, objected to as impracticable, because as neither the Commissioner nor the Secretary could prescribe penal regulations they would have no real control over the use of the alcohol after it had once been received. Section 61 granted no right to receive any rebate until the collector should have been satisfied that the regulations had been complied with and the alcohol legitimately used. It made the right to rebate dependent on compliance with regulations, and hence on the existence of regulations; but it in no way increased such power as the Secretary then had to enforce regulations, and practically it called upon him first, as already stated, to ascertain whether, with that power, any regulations which he might make would be adequate.

The history of section 61 itself shows that this is the true construction to put upon it. This history is in striking contrast with that of the rest of the act of August 28, 1894. Besides the time spent by the Committee on Ways and Means in preparing the act, it was before Congress for eight months, during six and a half of which the separate sections were considered at length and debated

over in the House and in the Senate. This particular section, however, was inserted by the Senate after the act had been before that body for four months and a half, and just before final passage, after very brief debate. On June 28, 1894, Senator Hoar gave notice of an amendment, which consisted in the insertion of this section, which amendment was moved and agreed to the next day. (Cong. Rec., vol. 26, pp. 6956, 6982, 6985.) On July 3, 1894, the amended bill passed the Senate (id., 7136), and although the House did not concur in the Senate amendments until August 13, after two conferences (id., 8468), it is a matter of history that the issue between the House and the Senate concerned certain particular duties, notably those on sugar, coal, iron ore, and barbed wire, and that the bitterness of the contest about these prevented any discussion of the other features of the bill.

Now, it is perfectly apparent that, in the few moments that the Senate gave to the consideration of this section by itself, the House giving none at all, Congress did not undertake to devise a complete and practical scheme whereby alcohol in the arts, etc., should be freed from taxation, while the tax on all other alcohol should be collected as efficiently as before. What the history of this section shows is, that Congress desired to make alcohol free when used in the arts, but was uncertain whether this could be done with safety to the revenue or not, and therefore determined to provide a possible plan, leaving it to the Secretary of the Treasury to say whether, with the powers at his disposal, the object of Congress could be attained.

Appellant's counsel insist (Brief, pp. 94–100) that the Secretary of the Treasury could not have been compelled by mandamus to prescribe regulations under section 61, owing to the exercise of discretionary power necessarily involved in such an executive act. As the granting of a mandamus in any case is so largely a matter within the discretion of a court, it is difficult to assert positively beforehand, as to any case, that a mandamus could or could not issue. Assuming that appellant's counsel are right, however, their view only serves to refute their main contention, which is that as long as the alcohol has been used in the arts it is immaterial, as regards the rights of this and the hundreds of other claimants, that the Secretary has prescribed no regulations. If Congress vested the Secretary with such broad discretion as to the regulations he should prescribe, that mandamus would not lie to compel him to prescribe any at all, why was this done? Manifestly because Congress wished that the regulations should be the most effective which the Treasury Department, with its years of experience with the spirits tax, could devise for the protection of the Government against fraudulent claims or the subsequent recovery of the alcohol, and that new regulations should be prescribed from time to time as experience should suggest. Congress had no wish to tie the Secretary's hands in this matter of regulations in any way, as the subject was one of such vast importance. This being so, it is simply inconceivable that Congress should have intended, by the words "may use the same under regulations to be prescribed by the Secretary of the Treasury," that a rebate should, in any case, be granted for an unregulated use of the alcohol.

Necessity of regulations.

The question as to what might have been the appellant's rights if the Secretary had simply disregarded the law and refused to ascertain the fact upon which the operation of the law depended can not arise, because the Secretary did not so act. On the contrary, he reported to Congress at the earliest possible day that he had fully considered the subject and had made an unsuccessful attempt to frame such regulations as would, without official supervision, protect the Government and the manufacturers, but that the act was defective in not appropriating any money for the administration of section 61; or, in other words, that it had given him no power to enforce such regulations as alone would be effective. (Rec., 9.) Furthermore, he showed to Congress precisely what sort of regulations he would wish to enforce if he had the power and how much he believed such enforcement would cost, and Congress, as has been already seen, acquiesced in his conclusions.

It can not seriously be contended that the proposed regulations were not substantially such as Congress contemplated. The necessity of regulation appears on the face of section 61 itself. The words "manufacturer," "alcohol," "arts," "medicinal compounds," and "like compounds" are exceedingly broad terms, and must all be officially defined. Such standard definitions as the following would permit the section to operate far more extensively than Congress could possibly have intended:

> *To manufacture.* To make or fabricate anything for use, especially in considerable quantities or numbers, or by the aid of many hands or of machinery. (Century Dictionary.)

Manufacture is transformation—the fashioning of raw materials into a change of form, for use. (*Kidd* v. *Pearson*, 128 U. S., 1, 20.)

The word ["manufacture"] is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. (*Tide Water Oil Co.* v. *United States*, 171 U. S., 210.)

Art. A system of rules and traditional methods for facilitating the performance of certain actions; acquaintance with such rules, or skill in applying them.

Medicinal. Having the properties of a medicine; adapted to medical use or purposes; curative; remedial. (Century Dictionary.)

A rectifier is a manufacturer within the above definitions, and rectification an art. It is probable that the definition of "manufacturer," proposed by the Treasury Department (Rec., 10), was more restrictive than the statute contemplated, but some definition was necessary. The boundary line between medicinal and nonmedicinal compounds is very indistinct, and the use of the words "other like compounds" makes it peculiarly difficult to determine the limits which Congress intended to set to the operation of the section. As an illustration of the difficulty, it may be pointed out that although Angostura bitters, Amer Picou, and Benedictine have all been held to be spirituous preparations within the meaning of tariff laws (*Dallet* v. *Smyth*, 6 Blatch., 419; *Curiel* v. *Beard*, 44 Fed. Rep., 551; *In re Gourd*, 49 id., 728), yet lately a similar preparation, Boonekamp bitters, containing 47½ per cent of pure alcohol by weight, i. e., being very nearly

proof spirit, were held taxable as proprietary preparations and not as "other similar spirituous beverages or bitters," they being prepared by a secret formula. (*Ehrhardt* v. *Steinhardt*, 153 U. S., 177.) In *Wuppermann* v. *Ehrhardt*, a suit brought about the same time in regard to Angostura bitters, but not appealed, a similar conclusion was reached. These later cases indicate that many kinds of bitters, though chiefly used as beverages, might be alleged to come within the term "medicinal or other like compounds," and render it very difficult to prevent any law worded like section 61 from being used for the practical elimination of the distilled-spirits tax from the source of revenues.

There is no statutory definition of alcohol as regards strength, section 3248, Revised Statutes, defining it merely with reference to its general nature. In popular usage, alcohol is any liquor containing the spirit described in that section. (See Century Dict.) Hence the word "alcohol" under section 61 might be claimed to mean a spirit of any degree of proof, no matter how low.

Risks involved in the rebate system.

The use of such exceedingly vague terms as are found in section 61 necessitated not merely an official definition of them, but the exercise of governmental supervision over all operations conducted under the section, in order to prevent those operations from going beyond the scope of the law as intended by Congress and as officially defined. Moreover, even where the manufacture was itself within

the contemplation of section 61, supervision was necessary to insure a proper use of the alcohol in such manufacture.

The frauds which have been committed in regard to the spirits tax involve two kinds of operations, viz, illicit distilling and the rectification of illicit spirits. While illicit distilling, apart from rectification, has always been carried on more or less, the strict surveillance exercised over distilleries suffices to prevent it to a very large extent as long as the illicit product can be kept from coming into the hands of rectifiers or from being palmed off by them, after rectification, as if a tax had been paid thereon. Without proper checks on rectification, however, the temptation to fraud would be very great and the effect of any system of surveillance seriously impaired.

The risks to which the revenue would be exposed by the existence of a right to claim a rebate of the tax upon alcohol when used in the arts, etc., are very similar to those to which it is exposed at the hands of distillers and rectifiers, and should be guarded against in much the same way. The main features of the system pursued as to the latter are described in the Internal Revenue Report for 1875, and they may profitably be compared with what has been done in the present case.

The report (p. XVI) states how a distiller, by the connivance of the storekeeper, can make two fermentations within the time allowed for one, and thus obtain nearly double the quantity of spirits shown by his books. To use this illicit product he would get it into the hands of a rectifier, supplying him with stamps which had already been used and which should have been destroyed, but

had been preserved. This avenue for fraud was ultimately cut off by requiring all spirits to be officially inspected and guaged before rectification, and a detailed report of all the packages, by their various identifying marks, made out, and a portion of each tax-paid stamp returned with the report, and also by forbidding the issuance of rectifiers' stamps for more than the number of proof gallons determined by actual gauge. (*Act of July 16, 1894*, 27 Stats., 200; Regulations, pp. 85–88.) A similar official inspection and guage would be equally necessary under section 61, because without it manufacturers could procure packages from which the alcohol had been wholly or partially emptied, and remove the stamps therefrom and present them for rebate.

In point of fact, if there were no inspection of the alcohol received, either by rectifiers or by manufacturers, fraud would be much easier with the latter than with the former. Rectifiers would have to consummate their fraud by the use of illicit spirits, the procuring of which would itself be an illegal act and subject to risk of detection and punishment, while manufacturers could either merely pretend to use more alcohol in their business than had actually been used (and in many cases the fraud could be concealed by simply diluting the alcohol used), or they could use wood alcohol, a legitimate but untaxed substance, the possession of which would expose them to no risk, and which can for many purposes be used in the place of grain alcohol.

In the case of rectifiers the only possibility of fraud is in the issuance of rectifiers' stamps for more than the actual quantity of tax-paid proof gallons, and the subsequent

use of such extra stamps to cover up illicit distillation. The official inspection and gauging at the time of rectification prevent this, so that the Government need not follow the spirits to see what becomes of them. Under section 61, however, an initial inspection and gauging, although absolutely necessary, would still be inadequate, because while it would determine the actual quantity of tax-paid alcohol that came into the factory, it would not prevent the manufacturer from using the alcohol for other purposes than those which come legitimately within the terms "the arts, or any medicinal or other like compound." The only possible way to prevent such misuse of the alcohol as effectually as illicit distilling is prevented would be to adopt the same means, viz, continuous surveillance by a Government officer.

Removal of stamps a criminal offense.

To further illustrate the absolute necessity of official supervision, it may be pointed out that section 61 involves, as to every package of spirits used in accordance therewith, the commission of acts which for more than twenty-six years, i. e., ever since July 20, 1868, had been felonies. Revised Statutes, section 3324, provides as follows:

> Every person who empties or draws off, or causes to be emptied or drawn off, any distilled spirits from a cask or package bearing any mark, brand, or stamp required by law shall, at the time of emptying such cask or package, efface and obliterate said mark, stamp, or brand. * * * Every person who fails to efface and obliterate said mark, stamp, or brand at the time of emptying such cask or

> package, * * * or who removes any stamp provided by law from any cask or package containing, or which had contained, distilled spirits without defacing and destroying the same at the time of such removal, or who aids or assists therein, or who has in his possession any canceled stamp, or any stamp which has been used, or which purports to have been used, upon any cask or package of distilled spirits, shall be deemed guilty of a felony, and shall be fined not less than five hundred dollars nor more than ten thousand dollars, and imprisoned not less than one year nor more than five years.

In indictments under the above clauses of the section intent need not be shown (*United States* v. *Ulrici*, 3 Dill., 582), so that mere knowledge that the stamps were not obliterated, and voluntary omission to obliterate them, leaves the jury no option but to convict (*Quantity of Distilled Spirits*, 20 Fed. Cas., 116), and the mere having in possession a stamp once in use which has accidentally fallen off a package is an offense within the section. (*United States* v. *Spiegel*, 116 U. S., 270, 276.) Employers, including every member of a firm of employers, are indictable under this section for any violation of it by an employee. (*United States* v. *Adler*, 24 Fed. Cas., 764.)

Granting that section 61 was intended to modify section 3324 to some extent, and would protect anyone in removing stamps or having them in possession, provided he could prove that he came within its operation in so doing, the fact remains that section 3324 bears witness to the great risks to the Government which the removal of stamps or having them in possession after removal

would involve, and also to the risks to which persons who undertook to remove or keep such stamps for use under section 61 would be exposed. In the present case, not merely the appellant, but the employee who actually removed the stamps, and everyone through whose hands they have passed, is liable, not merely to indictment, but to conviction for a felony, unless he can prove that he acted by authority of section 61. To protect manufacturers and their employees, as well as to protect the revenue, it would be indispensable to have some means of fixing officially the character of all stamps upon packages used under section 61, as well as of the packages themselves from the moment such packages are obtained for such use, so as to distinguish them from other stamps and packages. It would probably be equally indispensable to require the stamps to be removed by a revenue officer, who should mark them in some way that would explain their removal. These points were covered by the regulations proposed by the Secretary of the Treasury (Arts. 16, 17, 24; Rec., 16–17, 19), but which he was unable to put in force.

SUPERVISION REQUIRED IN THE CASE OF BONDED MANUFACTURING WAREHOUSES.

The practice in regulating the use of materials free of tax in the manufacture of articles for export indicates the course which Congress must have intended should be followed under section 61. The *Act of June 30, 1864*, section 168 (13 Stats., 296), provided that "medicines, preparations, compositions, perfumery, cosmetics, lucifer

or friction matches, and cigar lights, or wax tapers, cordials and other liquors manufactured wholly or in part of domestic spirits, intended for exportation," might be manufactured free of tax in bonded warehouses under regulations to be prescribed by the Secretary of the Treasury, and that materials allowed to be exported free of tax or duty could be used in such manufactures without payment of tax or duty. The *Act of March 3, 1865*, section 1 (13 Stats., 482), forbade the manufacture of matches, lights, and tapers in bonded warehouses, but in other respects the section remained in force, and it was reenacted in Revised Statutes, section 3433.

By the *Act of March 24, 1874* (18 Stats., 24), imported rice, intended for exportation, was allowed to be stored and cleansed in bonded warehouses, subject to regulations to be prescribed by the Secretary of the Treasury, and the regulations for such warehouses have been the same as for those used under Revised Statutes, section 3433. (See Customs Regns. of 1884, arts. 617, 645–666; Customs Regns. of 1892, arts. 673, 693–704.)

Section 3433 was reenacted in the *Act of October 1, 1890*, section 10 (26 Stats., 614), and the scope of this section was greatly extended by section 9 of the Act of August 28, 1894 (the same act whose sixty-first section is under consideration in the present case), providing for the manufacture of goods of any kind for exportation, except distilled spirits from grain, starch, molasses, or sugar in bonded warehouses, from materials free of tax.

Although during the thirty years prior to 1894 but few classes of manufactures could be carried on in bonded manufacturing warehouses, yet the precautions adopted

to prevent fraud, and consequent loss of revenue, in the operations of such warehouses, have from the first been very complete. While considerable discretion has been left to the Secretary of the Treasury in the matter of regulations, the statutes have always imposed certain conditions upon the manufacturers, those imposed by the act now in force being as follows:

(1) The warehouses must be "similar to those known and designated in Treasury Regulations as bonded warehouses, class 6," i. e., the class known for thirty years as bonded manufacturing warehouses, detailed provisions for which (both as to their character and as to the conduct of the manufacturing that takes place within them) are found in every edition of the Customs Regulations.

(2) Satisfactory bonds must be given for the faithful observance of the law and regulations.

(3) A duly designated officer of the customs must supervise every removal of articles from the warehouse, as also all labor performed and services rendered under the provisions of the section.

(4) A sworn monthly return must be made in detail of all imported merchandise used, which return must be verified by the officer in charge.

(5) A list must be filed of all articles intended to be manufactured in the warehouse, with the formula of manufacture and the names and quantities of the ingredients.

(6) All labor performed and services rendered under the provisions of the section must be at the cost of the manufacturer.

The above provisions and the regulations prescribed by the Secretary of the Treasury are substantially the same that have been in force for thirty years, and they

furnish conclusive evidence of the desire of Congress to see to it that, as far as human care and foresight can go, the manufacturing privileges accorded by Revised Statutes, section 3433, and section 9 of the act of 1894 should not be made use of for any illegitimate purpose; yet in point of fact the risk of fraud, and consequent loss of revenue, in the case of manufactures for export is clearly much less than where alcohol is used in the manufacture of goods which are to remain in the country. The manufacture of spirits themselves in bonded manufacturing warehouses is forbidden, and the materials admitted to such warehouses free of tax can not be used in the construction and repair of the warehouses themselves, nor, of course, would it be lawful to eat or drink on the premises any edible or potable articles which had been admitted thereto free of tax, but with these exceptions it is obviously of no importance to the Government what becomes of the materials admitted to these warehouses free of tax, provided only that the products made from them be exported.

It is not necessary, in order to protect the revenue, that the products of these warehouses should be of one sort rather than another, nor that they should be used for one purpose rather than another. To take the case of alcohol, for instance, it is wholly immaterial whether the spirits used in a bonded manufacturing warehouse are afterwards recoverable from the product or not, or even whether they are used in the arts, or in medicinal or other like compounds, or for making beverages pure and simple. As long as the product is ultimately sent out of the country, there can be no fraud upon the revenue, nor

any competition with tax-paid goods or articles manufactured from tax-paid materials, whether that product be of one kind or another. In the case of alcohol used under the system contemplated by section 61, however, the actual use to which the alcohol is put is a matter of the greatest consequence, for if it is used to make a beverage, or is so recovered from the original product that it can afterwards be used as a beverage, its condition differs in no respect from that of tax-paid spirits, and its existence in that condition is a fraud both upon the Government and upon honest dealers. Hence the most effectual precautions should be taken to prevent any illegitimate use of the alcohol, but such prevention is obviously far more difficult than to prevent the domestic use of the products of bonded manufacturing warehouses. In the one case it is only necessary to make sure that nothing leaves the premises except for exportation; but in the other case the Government must know the character of each article produced by means of alcohol, and must make sure that no alcoholic product leaves the premises which can either be used as a beverage itself, or from which an alcoholic beverage can be recovered by any process with sufficient profit to offer a temptation. Far more careful and constant surveillance and scrutiny are needed, therefore, in the latter case than in the former.

Since, therefore, the use of materials, free of tax, in the manufacture of goods for export has always been under strict regulations and supervision, it follows *a fortiori* that in requiring the use of alcohol in the manufacture of goods for domestic use to be "under regulations to be prescribed by the Secretary of the Treasury,"

in order to secure a refund of the tax, Congress must have intended those regulations to be at least as stringent, and to provide for at least as thorough supervision as in the case of bonded manufacturing warehouses, the risk of fraud on the revenue as well as of injury to the interests of innocent parties being much greater where the manufactured product is not required to be exported.

No proper system of supervision can, however, be carried on free of expense, and hence, as the bonded manufacturing warehouse system exists for the benefit of the manufacturer and not of the Government, it has always been enacted from the date of the first bonded manufacturing warehouse law to the present day that—

> All labor performed and services rendered under these regulations [the act of 1894, sec. 9, reads, "under these provisions,"] shall be under the supervision of an officer ["a duly designated officer," act of 1894] of the customs and at the expense of the manufacturer.

The chief item of service and labor with which the United States is concerned is of course the supervision of the warehouses, and hence the regulations for bonded manufacturing warehouses provide as follows:

> 11. Bonded manufacturing warehouses shall be in the custody of the collector of customs, and placed in charge of a storekeeper, whose salary will be paid monthly to the collector by the proprietor, and the same means are to be used for securing the custody and safe-keeping of the goods therein as apply to other bonded warehouses. (The Customs Regulations of 1874, art. 573; of 1884, art. 646; and of 1892, art. 694, are to the same effect.)

The means above referred to "for securing the custody and safe-keeping of the goods," as far as concerns the duties of the storekeeper, are stated in the Customs Regulations of 1892 as follows:

> ART. 689. All bonded warehouses and public stores, including those occupied by appraisers, where there are such, will be placed by the collector in the custody of storekeepers, who will always keep the keys thereof in their own possession, and personally superintend the opening and closing of the doors and windows. * * *
>
> They will not permit goods to be received, delivered, sampled, packed, or repacked except in their presence or in the presence of some person designated as an assistant by the collector, nor without a written order from such collector. They will keep accurate accounts in detail of all goods received, delivered, and transferred, and of all orders for sampling, packing, and repacking. They will also make daily returns of all goods received and delivered, and also the permits for the delivery of the same, which returns * * * must be certified by the proprietor or his agent as correct, and will inform the collector or warehouse superintendent of any infraction of the warehouse regulations.

The above regulations show that constant supervision by a permanently employed storekeeper is an essential feature of the bonded manufacturing warehouse system, and this being so it is but right that the cost of his services should fall upon the party benefited by the system, i. e., the manufacturer. For the purposes of the present argument, however, it is only necessary to observe that the bonded manufacturing warehouse system has always involved strict regulation and supervision, and

that the expense incurred thereby has always been provided for by law, the particular method adopted for meeting the expense being subordinate to these main facts.

THE REGULATION OF THE USE OF ALCOHOL FOR SCIENTIFIC PURPOSES NO CRITERION.

The system pursued in regard to alcohol withdrawn for scientific purposes, under Revised Statutes, section 3297, and the *Act of May 2, 1878* (20 Stats., 48), forms no real exception to the general practice of keeping a strict watch over all distilled spirits until the tax is paid, nor does it furnish any precedent for what should have been done under section 61. The quantity of alcohol withdrawn for scientific purposes is very small (74,697 proof gallons in 1894–95; 88,597 proof gallons in 1895–96; see Commr. of Int. Rev. Rept. 1895, p. 149; Rept. 1896, p. 149), and the applicants for such withdrawal belong to a class of persons to whom the temptation to so misuse this privilege as to defraud the Government does not appeal to any appreciable extent. Hence the Treasury Department is satisfied with requiring each such applicant to file a bond, with sufficient sureties, to secure the legitimate use of the alcohol withdrawn. Should any suspicious circumstances arise in any case, such as a sudden increase in the amount withdrawn, the Secretary of the Treasury, who is merely authorized, not required, to grant permits of withdrawal, could refuse any further permit to the suspected applicant. Obviously the regulation of the use of a few thousand gallons of alcohol in scientific research is a very different matter from the regulation of the commercial use of millions of gallons.

NO APPROPRIATION FOR THE ENFORCEMENT OF REGULATIONS EXISTED.

Seeing that the plain intent of section 61 is that the regulations had to exist before the right to rebate could arise, it is really unnecessary to inquire whether or not the Secretary was justified in declining to prescribe the regulations called for by section 61; yet, if this inquiry be for any reason held desirable, it will demonstrate that the Secretary could not possibly have taken any other course. To properly enforce the regulations which he submitted to Congress—regulations which seem to be thoroughly reasonable and which Congress never disapproved—would have certainly cost much more than the estimated $500,000, but neither this sum nor any part of it was at the Secretary's disposition. The repayment of an internal-revenue tax being obviously a matter to be dealt with by the Bureau of Internal Revenue, the expense of enforcing the necessary regulations, if provided for at all, would certainly have to come out of some appropriation for that bureau, but no appropriation applicable to the enforcement of section 61 was made. The cost of the Internal-Revenue Service is met by appropriations made specially each year and limited in their application. For the fiscal year 1894–95 these appropriations were as follows:

(1) Office of the Commissioner of Internal Revenue:	
Salaries	$261,590
Stamp agent and counter	2,500
(2) Collecting internal revenue:	
Salaries and expenses of collectors, deputy collectors, etc., including expenses incident to certain specified statutes	1,710,000

(2) Collecting internal revenue—Continued:
Salaries and expenses of agents, storekeepers, etc., and for miscellaneous expenses.....$1,900,000
(3) Punishment for violations of internal-revenue laws. 50,000

The above three classes of appropriations, made by the acts of July 31 and August 18, 1894 (28 Stats., 177, 180–181, 388), constituted the only funds available for matters relating to internal revenue when the act of August 28, 1894, was passed. In so far as section 61 involved work to be done by the Commissioner himself or his subordinates in his office, the performance of such work was made possible by the first appropriation above mentioned, and accordingly all the necessary work of that character was done. Section 61 called for "regulations to be prescribed by the Secretary of the Treasury," and the duty of preparing such regulations necessarily devolved upon the Commissioner and his subordinates. In the early part of September, 1894, the Secretary requested that such regulations should be drawn up, and it was done accordingly. Had it been possible to enforce these or any similar regulations, other work would have been required of the Commissioner's office—viz, drafting of forms, keeping of accounts, etc.—and this also would have been made possible, at least theoretically, by the appropriation for that office. To *enforce* the regulations, however—i. e., to supervise the use of alcohol under section 61—there was no appropriation, since such supervision could not be performed by the personnel of the Commissioner's office, nor did it concern in any way the collection of internal revenue nor the "detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws." Had the system been

put in operation, the persons employed for this latter purpose would probably have had to visit from time to time places where alcohol was used in the arts, but such detective service would have been something very different from the supervision necessitated by section 61.

The diversion of any of the three classes of appropriations above mentioned to such an object as the enforcement of regulations under section 61 would clearly have come within the prohibition of Revised Statutes, section 3678, the objects for which such appropriations were respectively made being sufficiently defined in the appropriation acts, and manifestly not including any object of the nature of such supervision.* The agents, gaugers, and storekeepers provided for are all persons engaged in "*collecting* internal revenue" (28 Stats., 180), and the miscellaneous expenses are similarly restricted. Besides, section 3642, Revised Statutes, forbids any expenditure for official compensation out of appropriations for miscellaneous purposes.

While it is true that a portion of the appropriation for "collecting internal revenue" is applicable to certain other objects, all such objects are particularly specified and are evidently classed with the collection of internal

* In view of the above, it is superfluous to allude to the manifest inadequacy of the appropriations for the Internal-Revenue Service for 1894–95 if they were to be applied to any other object than concerned the collection of the revenue. In point of fact they were smaller than for the previous fiscal year, and as there was no change in the revenue laws to decrease the work of the Bureau (except as to the sugar bounty, and that not till after the appropriations were made), the reduction only indicates an intention to enforce greater economy.

revenue merely as a matter of convenience. These objects are the taxation of oleomargarine, the inspection of tobacco exported, and necessary expenses in regard to the sugar bounty, and their special mention excludes the idea that this appropriation could be applied to any other objects not coming strictly under the head of "collecting internal revenue." The special mention of the oleomargarine act (August 2, 1886; 24 Stats., 209) is particularly significant, because, as that act taxed the manufacture and sale of oleomargarine, the expenses involved thereby might perhaps be regarded as expenses for collecting revenue, the regulation of the manufacture, sale, importation, and exportation being merely incidental to the taxation. Congress did not take this view, however, but considered that, the regulation being the main purpose of the act, its expenses could not, without special authority, be charged to the usual appropriation for collecting revenue, although a tax was imposed.

It is contended in the appellant's brief (pp. 76–91) that the appropriation for "collecting internal revenue" was not, in point of fact, strictly limited in its use, and that in several instances expenses not incident to the collection of internal revenue were paid out of the appropriation for such collection; but an examination of the instances cited will show that the conclusions which were sought to be drawn from them are utterly unwarranted.

Duties of collectors in regard to drawbacks.

Section 3161, Revised Statutes, imposes upon internal-revenue collectors certain duties in regard to drawbacks, but these occasional duties are merely added to their

primary duties of collecting internal revenue, for which they are paid under the appropriation for that purpose. The Internal Revenue Report for 1896 (p. 198) shows that in the past twenty years the whole number of drawback claims has never exceeded 1,744 in any one year, that it has usually been much below that figure, and that in 1895–96 it was 227. It is clear that the performance of official duty in connection with such claims is only occasionally required, so that all that is needed is to detail officers to attend to such matters as each case comes up. As a matter of convenience this duty is imposed upon collectors, but the regular pay of such officers, who are paid from the appropriation for collecting internal revenue, is not affected by the peculiar nature of such occasional duties.

The only possible instance where the Internal Revenue Bureau may perhaps keep a man exclusively employed about drawback matters is in the case of the clerk who attends to those claims in the Commissioner's office, but the appropriation for that office is not limited to the work of collecting internal revenue.

Withdrawal of spirits for use in bonded manufacturing warehouses.

As to the duties of internal-revenue officers in connection with the withdrawal of spirits from bond for use in bonded manufacturing warehouses, under sections 3330 and 3444, this also is a very trifling matter, there being very few such warehouses. As a matter of principle, however, these duties may rightly be included under the head of collecting internal revenue, because

until the spirits are actually used in manufacturing they are taxable, so that until they actually reach the manufacturing warehouse they are under the control of the internal-revenue officers for precisely the same purpose as are all spirits in bond—i. e., for the purpose of insuring the collection of revenue. Under section 61, on the other hand, the object of the control of the spirits would have been to prevent fraudulent claims for rebate, and not the collection of a dollar of revenue.

Investigation of tax-refund claims.

The use of "local officers in the field," in the investigation of applications for a refund of taxes under sections 3220 and 3221, was cited as an instance of the failure to restrict the expenditure of the appropriations for collecting internal revenue to matters necessarily connected therewith. All applications under section 3220, however, are necessarily based exclusively upon the acts of the revenue officers in the collection of internal revenue, so that the only matter to be investigated is whether or not those officers have done their duty in the collection of revenue. Whatever official work is done under this section concerns "the collection of revenue" in the strictest sense of those words, even though in some cases the result of such work may be the ultimate refunding of money which was not properly revenue, but was wrongly collected as such.

Section 3221 concerns applications for the abatement or refund of taxes due or paid on spirits destroyed while in Government custody. Such custody is for the purpose of the ultimate collection of internal revenue, and

the investigation of applications under this section is the investigation of circumstances arising during that custody and for the purpose of determining whether revenue should or should not be collected, or should or should not have been collected, upon the spirits destroyed. Such an investigation concerns the collection of revenue.

The question which would have arisen under section 61, had it ever gone into practical operation, would not have concerned the propriety of the collection of the tax upon alcohol at all, as no alcohol was intended to be used under this section except such as had been properly taxed; but the only question would have been whether the *use* of the alcohol had been such as to call for a refund of the tax, a question which had nothing to do with the collection of revenue whatever, but merely with the retention or repayment of properly collected revenue.

Inspection of vinegar factories.

The fact that the inspection of vinegar factories (where the alcohol incidentally produced is allowed to be used free of tax) is performed by revenue agents and deputy collectors, who are paid out of the appropriation for collecting internal revenue, does not constitute a diversion of that appropriation to purposes other than such collection. Section 3282, Revised Statutes, makes all the provisions of sections 3276, 3277, and 3278 (authorizing revenue officers to enter and examine distilleries) "applicable to all premises whereon vinegar is manufactured, to all manufacturers of vinegar, and their workmen or other persons employed by them." This means that in

order to insure the collection of the revenue from distilled spirits vinegar factories were put on the same footing as distilleries, subject to the same inspection. The mere fact that the spirits produced at vinegar factories are not to be taxed, but to be used up in the manufacture of vinegar, does not make the inspection of such factories different in its character or object from the inspection of distilleries, because, until so used up, the spirits produced at vinegar factories are capable of being used for the same purposes as those produced at distilleries, and hence in both cases the inspection is properly performed by the same class of men, paid out of the same appropriation.

Withdrawal of alcohol in manufacture of sorghum sugar.

The position taken by the Bureau of Internal Revenue as to the withdrawal of alcohol, free of tax, for use in the manufacture of sorghum sugar, under the *Act of March 3, 1891* (26 Stats., 1050), is also in perfect harmony with what has been stated above as to the limited application of the internal-revenue appropriations. That act authorized distilled spirits of a certain strength to be withdrawn from distillery warehouses, free of tax, and used in the manufacture of sorghum sugar "under such bonds, rules, and regulations for the protection of the revenue * * * as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe." The regulations prescribed (Series 7, No. 7, Revised.—Supplement No. 1, 1891) were very full, and have evidently served as the model for the regulations proposed under section 61. They

provided for complete surpervision of the use of such alcohol and the assignment of a deputy collector and gauger to each factory, but this called for no additional appropriation, not only because if such alcohol had ever been withdrawn from warehouse for the purpose stated it would have remained taxable, and subject to supervision until actually used up, but also because the factories were already under the charge of the Bureau of Internal Revenue by authority of the act of October 1, 1890, Schedule E (26 Stats., 583), providing for the allowance of a bounty on sugar "under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe." The internal-revenue appropriations for each fiscal year from 1891–92 to 1894–95, inclusive, had all provided for meeting "expenses incident to enforcing the provisions of the act of October 1, 1890, providing for the payment of a bounty on sugar" (26 Stats., 925; 27 Stats., 200, 692; 28 Stats., 180), and to require the men already on duty at sorghum-sugar factories, or other men whom the Commissioner had authority to employ there, to supervise the use of alcohol, would have involved no expense not provided for by such appropriations.

The "rules and regulations" authorized by the sugar-bounty law might require any degree of strictness of supervision which the Commissioner saw fit to enforce, and if the precise work done in factories of a certain class called for more supervision than that done in those of another class, the Commissioner had it in his power to keep a man permanently employed at one place, while other places where

a different class of work was done were merely visited from time to time. Hence, when the Commissioner proposed to employ a deputy collector and gauger at each sorghum-sugar factory using alcohol free of tax he merely proposed to exercise that special supervision which the law entitled him to exercise at all sugar factories, and for the expense of which there was an appropriation.

In point of fact, however, there were in 1891 but six producers of sugar from sorghum in the United States (Rept. of Com. of Int. Rev. 1891, p. 200), and no alcohol was ever withdrawn free of tax under the act of March 3, 1891. (See Report of Commissioner of Internal Revenue, 1891, pp. 180, 200; report of 1892, p. 175, the later reports making no mention of it whatever.) No expense was therefore ever incurred on account of supervision under this act.

Withdrawal of alcohol for scientific purposes.

The withdrawal of alcohol free of tax for scientific purposes, under section 3297, Revised Statutes, and the *Act of May 3, 1878* (20 Stats., 48), which has been already referred to above, involves merely the approval of applications and bonds, the granting of permits, the making of certain entries in storekeepers' and gaugers' reports and collectors' accounts, and the transmission of a few papers. (See the published regulations.) These acts are all merely a part of the routine business of the office of the Commissioner of Internal Revenue and of the storekeepers, gaugers, and collectors, and are in no way distinguished from their other official acts, so that no separate appropriation is required. On account of the small

amount of alcohol withdrawn for scientific purposes and the high character of the class of persons so using alcohol, no supervision of their use of it has ever been thought necessary; but should it ever be found so, it could be provided for from the appropriation for collecting internal revenue, because, until used up, this alcohol also maintains its taxable character and is properly the subject of supervision.

Use of grape brandy in fortification.

Similarly, grape brandy used free of tax, in the fortification of pure sweet wine, under the *Act of October 1, 1890*, sections 42–46 (26 Stats., 621–623), is taxable until actually so used, and is properly the subject of supervision by the Bureau of Internal Revenue. Where the wine producer is also a distiller his premises are subject to supervision as a distillery, whether he fortifies his wine or not, but even in the case of other persons, the cost of supervising the use of grape brandy for fortification is, for the reason above stated, properly chargeable to the appropriation for "collecting internal revenue."

While it is true that the result is the same, to the user of spirits, whether he obtains them free of tax or obtains a rebate after their use, so that from this point of view section 61 may be called a law for "free alcohol," yet there is absolutely no analogy between *the supervision* of the use of spirits which are freed from taxation when used for a particular purpose and that of the use of tax-paid spirits upon which a rebate of the tax is afterwards to be claimed. In the former case the spirits are subject to taxation until they are actually used, while in the latter

case, the tax upon the spirits having been paid, they can not again become subject to taxation, and hence the supervision of their use can have nothing to do with the collection of internal revenue. Such supervision may be absolutely necessary in order to prevent the presentation and payment of fraudulent claims for rebate, but neither the payment of just claims nor the prevention of fraudulent ones can be regarded as the collection of revenue, and the cost of such supervision can not lawfully be paid for out of an appropriation for the cost of collecting internal revenue.

The filled-cheese law.

The "filled-cheese" law of June 6, 1896 (29 Stats., 253), bears some analogy to the oleomargarine law of 1886, in that it regulates a business as well as imposes a tax. Congress has evidently considered, however, that, unlike the oleomargarine law, the taxation is the main feature and the regulation merely incidental thereto, so that the expense involved thereby may properly be charged to the appropriations for the Commissioner's office and the collection of internal revenue.

PRACTICE UNDER CUSTOMS APPROPRIATION NO PRECEDENT.

Appellant's counsel point out (Brief, pp. 87–89) that the permanent annual appropriation "for the expenses of collecting the revenue from customs" (R. S., § 3687) is in practice applied to other purposes than that of the mere collection of revenue, and from this they contend that

there is no reason for a stricter rule as to the appropriations for "collecting internal revenue." The expenses of collecting the customs revenue were originally retained by the collectors out of the fees of their respective offices, and the permanent appropriation system dates from the act of March 3, 1849 (9 Stats., 398). Under the fee system all the expenses of the service, whether in connection with duties or drawbacks, were provided for, and from the first all official acts in connection with drawbacks have been performed by customs officers. In view of this prevailing system, it was natural that an appropriation "for the expenses of collecting the revenue from customs" should be understood as intended by Congress to cover all expenses in connection with services performed by customs officers, especially as in 1849 the policy of restricting the use of appropriations to the precise purpose named was not at all as strictly enforced as now, the systematizing of the business of the Treasury Department having been a matter of development.

While the permanent appropriation "for the expenses of collecting the revenue from customs" has for fifty years been understood as applicable to the expenses of the customs in a rather broad sense, no such view has ever been taken of the annual appropriations for "collecting internal revenue," which, as already shown, have always been applied exclusively to matters more or less strictly relating to such collection. Even if this had been otherwise, and the appropriation for "collecting internal revenue" had been intended by Congress and understood by the Secretary of the Treasury as covering all expenses incurred in the internal-revenue service outside of the

Commissioner's office, the Secretary would still have been justified in postponing action under section 61 until Congress had enabled him to employ the requisite force. The appropriation act of 1894 (28 Stats., 180–181) forbade him to employ more deputy collectors or clerks, and while he might, theoretically, have employed additional men of the storekeeper and gauger class, yet to have done so to the extent required for proper supervision of the industrial use of alcohol all over the country would have most seriously impaired the appropriation applicable to the work of supervising the distillation of spirits, and thus have prevented the proper collection of the revenue unless Congress came to his relief. Whether the employment of men to enforce regulations under section 61 would have been illegal or merely impracticable, the consequence is the same, that the Secretary was justified in not employing them, and can not be charged with any attempt to override the will of Congress.

COLLECTORS NOT CHARGED WITH ENFORCEMENT OF REGULATIONS.

Appellant's counsel (Brief, p. 90) point out that section 61 imposed certain duties upon collectors of internal revenue, and that such duties could properly have been performed by them and their deputies without additional compensation, although their salaries were paid out of the appropriation for collecting internal revenue. This is all undoubtedly true, because the mere fact that an officer's salary is required by statute to be paid out of a particular appropriation can not affect the power of Congress to impose new duties upon him, no matter how dif-

ferent such duties may be from those for which he is primarily employed and paid. It is equally true, however, that under section 61 the collectors were not to enforce the regulations or in any way to supervise the manufacturing operations, but only to satisfy themselves that the regulations had been complied with and the alcohol used thereunder, which practically would have meant their receiving and passing upon the reports of the officers specially appointed to supervise the manufacturing and enforce the regulations. The trouble with section 61 was not that there was no appropriation to pay for making regulations or for receiving proof that they had been complied with, but that there was none for enforcing them.

COST COULD NOT HAVE BEEN LAID ON THE MANUFACTURES.

The use of any money not appropriated for the purpose would have been wholly illegal under Revised Statutes, section 3678, and to have required the applicants for rebate to pay the expense would have been equally illegal, in spite of the manifest justice of such a course. This course should probably be held to come within the prohibition of the *Act of May 1, 1884* (23 Stats., 17), reading as follows:

> Hereafter no Department or officer of the United States shall accept voluntary service for the Government, or employ personal service in excess of that authorized by law, except in cases of sudden emergency, involving the loss of human life or the destruction of property.

In point of fact, however, the above statute is not needed to make it clear that the cost of enforcing regulations as to the use of alcohol can not be put upon the

applicants for rebate without express authority of law, because such a system would amount to reducing the rebate, which, having been fixed by Congress at the whole amount of the tax paid, as shown by the stamps, can not be reduced by executive action. In the case of *Ames* v. *Hager*, cited in Treasury Department Decisions, No. 9129, in the United States circuit court in California, it was held that a manufacturer who made entry for drawback under Revised Statutes, section 3019, could not be required to pay for the services and expenses of a customs inspector in counting, inspecting, and identifying the manufactured articles, although such counting, inspection, and identification were required by the customs regulations as essential to the ascertainment of the amount of drawback to be paid. This decision has never appeared in the reports, but it is so manifestly correct that it was at once submitted to by the Treasury Department, which changed its practice so as to conform thereto.

By an extraordinary stretching of the doctrine of implied statutory powers, appellant's counsel contend that "as the act implies all powers necessary for its execution," the Secretary of the Treasury must have had the power to enforce all necessary regulations, "even if no appropriation existed." The only hint, however, as to the mode in which the Secretary's power might be exercised is found in the extraordinary suggestion that "he could have provided by regulations for the payment of the expenses by those claiming the benefits of the act." (Appt.'s brief, p. 76.) This suggestion is doubly extraordinary as coming from appellant's counsel, who, in the

same brief (pp. 56–63) insist so strongly that the Secretary's failure to carry out section 61 was an unconstitutional assumption of power, by an executive officer, "to tax an article which Congress has said shall be free of tax."

That the Secretary of the Treasury has no power to impose taxes is undeniable, and while one may well question whether his inaction in regard to section 61 involved an assumption of that power, it is manifest that an assessment on the applicants for rebate, to provide a fund for carrying on the rebate system, would have been taxation pure and simple. Moreover, this is precisely what the United States circuit court in California, in the analogous case of a drawback, held could not be done. (*Ames* v. *Hager*, Treasury Decisions, No. 9129, cited *supra*.)

Under these circumstances it is hardly necessary to point out that the cases upon which this contention rests bear no analogy to the present case. An authority to municipal corporations to borrow money implies the power to levy taxes for the payment of the loans, because that is "the ordinary means employed by such bodies to raise funds" (*United States* v. *New Orleans*, 98 U. S., 381, 393), but the "ordinary means" by which the Secretary of the Treasury pays the persons employed in his Department is by an appropriation made by Congress for the purpose, and not by an assessment levied upon outside parties who have business with his Department. It is usual to delegate to municipal corporations the power to impose taxes, and to authorize municipal officers to grant permits to lay electric wires under ground,

as in *Rolls Co. Court* v. *United States* (105 U. S., 733), *U. S. Electric Lighting Co.* v. *Commissioners* (24 Wash. Law Rep., 777), and the other cases cited by appellant's counsel, but it is most unusual, in modern constitutional governments, to delegate to executive officers the power to lay any taxes or assessments whatever.

It should be remembered that when we speak of something as implied from the language of a statute we mean that the legislature actually intended that thing, but considered that under the circumstances it was needless to set it out in specific language, because there was really no room for doubt. If there be any serious doubt as to the intention of the legislature, the implication can not be permitted, and, to take the present case, that Congress must have intended to empower the Secretary of the Treasury to raise money, independently of appropriations, to pay for work done by his Department, is about the last thing that can be asserted with confidence.

Even in the case of municipal corporations the power to levy taxes is not implied when "there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference." (*Loan Association* v. *Topeka*, 20 Wall., 655, 660.) In the present case the prohibition of the employment of personal service in excess of that authorized by law (*Act of May 1, 1884*, 23 Stats., 17) and of the drawing of money from the Treasury without an appropriation (Const., Art. I, sec. 9; Rev. Stats., sec. 3675) show that without express authority of law no use could have been made of the money obtained from the applicants for

rebate after it had been paid into the Treasury, and hence that no power to receive such money could have been implied.

It may be extraordinary that Congress should have intended that section 61 should not, or contemplated that it might not, be carried out without further legislation (though an examination of the peculiar circumstances under which the section was enacted shows that such an intention or contemplation was quite reasonable), but it would have been much more extraordinary if Congress had intended by this section to imply a right, on the part of an executive officer, to levy upon applicants for rebate such assessments as he might see fit, and in other respects to act in a manner forbidden by statute, and practically by the Constitution itself.

Since, then, the adoption of effective regulations for the use of alcohol under section 61 was necessary for the protection of the revenue and of the interests of honest dealers in spirits, and was intended by Congress, and no regulations could be effective without the expenditure of a large sum of money, which money Congress did not provide either by appropriation or by authorizing the cost to be laid upon the applicants for rebate, the Secretary of the Treasury clearly could do nothing more than report to Congress at the earliest date his inability to carry this section into execution, stating plainly the cause of such inability. This he did, and, as already stated, both the action and inaction of Congress manifested its approval of his course.

THE POLICY OF FREE ALCOHOL IN THE ARTS HAS NEVER APPEALED STRONGLY TO CONGRESS.

The appellant's brief (pp. 4-17) contains an elaborate argument in regard to the general policy of relieving alcohol, when used in the arts, etc., from all taxation, and also in regard to this policy as carried out by foreign countries. The conclusion attempted to be deduced is that as these considerations have frequently been brought before Congress, and measures to carry out this policy repeatedly introduced, therefore section 61 must necessarily be construed as expressing the intention of Congress to adopt what appellant's counsel call "a new policy of taxation"—to grant a rebate of the tax in any event, so long as the alcohol was used in the arts, etc., whether such use was under regulations or not. In point of fact, however, the logical conclusion to be drawn from the appellant's argument is precisely the reverse of this. It is evident that, in spite of the many and strong arguments in favor of the policy of free alcohol in the arts, it was only with great difficulty and after repeated efforts that Congress was induced to pass any measure whatever in the line of that policy. This being so, one would naturally expect the first measure of this character to be a very cautious one, providing only for such freedom (whether direct or indirect) from taxation as could in no way endanger the revenue to be derived from alcohol when used as a beverage; or, in other words, since experience points to official regulation as the best means of attaining this end, one would naturally expect to find official regulation made a condition inseparable from any

grant of relief from taxation of alcohol when used in arts, etc.; and if the language of the statute admitted of any doubt on this point, it would be much more reasonable to construe such language as requiring official regulation as an essential condition of the relief granted, rather than as granting any relief from the tax in the case of alcohol not used under regulations. To contend that Congress, after having repeatedly been applied to in vain by the industrial users of alcohol, suddenly became convinced that a remission of the tax was so essential to the public welfare that it should be made in any event, even if there was no official regulation of the use of the alcohol, is to disregard utterly the natural course of human action, especially in regard to legislation, where gradual development is the rule, rather than violent and sudden change.

The appellant's contention as to the sudden desire of Congress that alcohol, when used in the arts, should at all hazards be free from taxation, is seen to be peculiarly inapt when it is reflected that although one object of the act of August 28, 1894, was to dispense with all unnecessary taxation, the House of Representatives, vested under the Constitution with the right of initiative in bills to raise revenue, voted to increase the spirits tax from 90 cents to $1.10 per proof gallon without making any exception in the case of alcohol used in the arts, and that section 61 was only inserted by the Senate along with a number of other amendments which the House was compelled to accept in order to avoid losing the whole bill. Assuredly a liberal construction of section 61 is not justified by any evidence of an overwhelming

desire on the part of Congress to do anything for the users of alcohol in the arts.

The contention (appellant's brief, p. 14) that the freeing of alcohol from taxation when used in the arts was "a logical element of the act of 1894," when considered in the light of what the House of Representatives really undertook to do in that act, only shows that the logic of appellant's counsel is not that of the House. The contention is, moreover, greatly weakened by the extravagance of the arguments in its support. Appellant's counsel say that the provisions of the act of 1894 in regard to free raw materials, reduction of customs duties on manufactured articles, and the increase of the spirits tax "made the policy of free alcohol in the arts * * * *an industrial necessity*," that without free alcohol "the results would have been of the most detrimental character to American manufacturers," and that "no American Congress could have contemplated so iniquitous a result of legislation." Now, in point of fact, during the whole period of nearly three years that the act of 1894 was in force, manufacturers received no benefit from section 61, and this section was repealed in June, 1896, while the spirits tax has not yet been reduced below the rate adopted in 1894. As far as legislation is concerned, therefore, the actual conditions have been precisely those which appellant's counsel have denounced as necessarily involving results "of the most detrimental character to American manufactures," yet it does not appear that any wide-spread injury resulted, or even that the failure to carry out section 61 produced any

detrimental effect whatever upon manufacturing interests, or any discrimination which has been seriously felt by American farmers or distillers. Moreover, although the drawback allowed on foreign alcohol contained in manufactured goods when exported (see appellant's brief, p. 16) may discriminate against the use of American alcohol in certain lines of manufacture, it can not do so in the appellant's business. The alcohol which he uses is wholly evaporated in the process of the manufacture (Rec., p. 4), so that nothing remains on which to claim a drawback. The contention that section 61 should receive the construction for which the appellant contends, in order to avoid a discrimination against American farmers and distillers, has therefore no force whatever in the present case.

THE CASES IN THE LINE OF CAMPBELL *v.* UNITED STATES ARE NOT IN POINT.

The radical difference between the language of section 61 and that of the drawback laws has already been pointed out. In spite of this manifest difference, the chief contention in the court below in behalf of the claim was that the present case came within the rule laid down in *Campbell* v. *United States* (107 U. S., 407), viz: That where a statute declares that there shall be a rebate or drawback of a tax under certain circumstances, the amount to be determined under regulations to be prescribed by the Secretary of the Treasury, the inaction of the Secretary is immaterial, and the drawback must be paid whether the amount has been ascertained under the Secretary's regulations or not, because the statute, and not

the Secretary's regulations, grants the drawback. That this is still the chief contention is shown by the prominence given to the opinion in the *Campbell* Case in the appellant's brief (pp. 19–26). The full and sufficient answer to this contention, as the court below has pointed out, is that the language of the drawback law is very different from that of section 61, and that consequently the circumstances of the present case are not the same as those of the *Campbell* Case, the differences being those between the conditions upon the fulfillment of which the right to drawback exists and those precedent to the existence of a right to rebate under section 61. Under the drawback law the conditions precedent are (1) use of imported materials in manufacture, (2) ascertainment of amount of drawback, such ascertainment to be made in accordance with the regulations, and (3) exportation. In the *Campbell* Case the first and third conditions existed without question, and it was held that the second also had been fulfilled, because the amount due had been proved to the satisfaction of the court as completely as if every reasonable regulation had been complied with, and it was not the claimant's fault that official action under the regulations had been suspended. Had that suspension prevented exportation or even the ascertainment of the amount due on exportation, a different case would have been presented, and hence the doctrine of the *Campbell* Case can only apply where the results intended to be attained by official action are as fully attained by other means. Under section 61 the conditions precedent are, (1) use of alcohol by manufacturers under regulations, (2) proof of compliance with

regulations, (3) proof of use of alcohol, and (4) delivery of stamps for taxes paid on the alcohol used. Had the first condition existed in the present case and had the collector refused to receive the proof, the case would bear more resemblance to *Campbell* v. *United States*, because the proof might be made to the court as completely as to the collector, but the trouble is that the first condition never existed and that nothing can take its place. As this court said in *United States* v. *McLean* (95 U. S. 750), already cited:

> Courts can not perform executive duties, or treat them as performed, when they have been neglected. They can not enforce rights which are dependent for their existence upon a prior performance by an executive officer of certain duties he has failed to perform.

A fortiori courts can not enforce rights which are dependent for their existence upon the prior performance of certain acts in concurrence with or in subordination to certain official acts which have never been performed.

The difference between the present case and that involved in *Campbell* v. *United States* may be stated thus: that where Congress attaches certain consequences to the doing of a thing and merely requires the proof to be made in accordance with official regulations, then if those regulations are not made or are suspended, but the proof is made to the satisfaction of a court or jury as completely as if any reasonable regulations had been complied with, the nonexistence or suspension of the regulations is immaterial; but if Congress requires the thing itself to be done (as distinguished from the mere presentation of proof of the doing of it) under official regulations, then

the absence of regulations is material, and the same consequences will not attach as if the regulations had existed and had been complied with.

The sugar-bounty law, passed upon by the Court of Claims in *Glynn* v. *United States* (32 C. Cls. R., 82), was somewhat analogous to the drawback law, and hence that case also is easily distinguishable from the present. The language of the law, so far as it was involved in that case, was this:

> That on and after July first, eighteen hundred and ninety-one, and until July first, nineteen hundred and five, there shall be paid, from any money in the Treasury not otherwise appropriated, under the provisions of section three thousand six hundred and eighty-nine of the Revised Statutes, to the producer of sugar testing not less than ninety degrees by the polariscope, from beets, sorghum, or sugar cane grown within the United States, or from maple sap produced within the United States, a bounty of two cents per pound; and upon such sugar testing less than ninety degrees by the polariscope, and not less than eighty degrees, a bounty of one and three-fourths cents per pound, under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. (26 Stats., 583.)

The same statute provided for regulations of the manufacture and production of sugar, restricted the bounty to persons licensed by the Commissioner of Internal Revenue, and required an application for license to be made, stating certain facts, and accompanied by a bond, with sureties, to secure compliance with the rules and regulations. The license had been given, and all the regulations in regard to manufacture had been complied with,

but most of the sugar had been burned up before it was officially weighed and tested.

The Court of Claims held that the right to a bounty "springs directly from the provisions of the law in the form of an express obligation to pay a certain compensation for certain productions," and that when such productions had been manufactured, in compliance with regulations and under a proper license, the right to a bounty was complete. All that the Commissioner of Internal Revenue had then to do was to ascertain the amount of the bounty.

The words "under such rules and regulations as the Commissioner of Internal Revenue * * * shall prescribe" manifestly related primarily to the payment of the bounty—i. e., practically to the ascertainment of the amount of bounty to be paid. This is shown by the structure of the single sentence composing the section, which may be summarized thus:

> That * * * there shall be paid * * * to the producer of sugar * * * a bounty of two cents a pound * * * under ruch rules and regulations as the Commissioner of Internal Revenue * * * shall prescribe.

What rules and regulations should be necessary was left to the Commissioner and Secretary to determine, and an appropriation was made for the expense involved. Such rules and regulations could, however, only relate to the proof of the quantity and grade of the sugar produced, and hence if they were relaxed as to any matter, or if their complete enforcement was accidentally pre-

vented, the court held that the right to bounty was not affected thereby. As long as the applicant for bounty had received a license to manufacture, whatever bounty he could prove himself to be entitled to was his, even though the Secretary of the Treasury might consider that the proof was not altogether such as the rules and regulations required. Other sections of the law required the manufacturing itself to be done under regulations, as well as under a license, and had those regulations not been complied with a different question would have been presented; but as it was the provisions of the law were such as to clearly distinguish the *Glynn* Case from the present one.

In *Morrill* v. *Jones* (106 U. S., 466; see appt.'s brief, pp. 27, 52) the statute had merely empowered the Secretary of the Treasury to regulate the method of proving that animals were specially imported for breeding purposes, so that they should be admitted free of duty. There was no question but that the animals in that case had been specially imported for such purposes, nor as to compliance with suitable regulations, but merely whether he could require the animals to be of superior stock when the statute had not so required. Had the Secretary, under section 61, prescribed regulations which were claimed to change the application of the statute, *Morrill* v. *Jones* would have had some bearing, but in the present case it can have none.

The cases of *Railroad Co.* v. *Smith* (9 Wall., 95) and in *French* v. *Fyan* (91 U. S., 169) are also cited by appellant's counsel. In both cases the act before the court was

that of September 28, 1850 (9 Stats., 519), reading as follows:

> To enable the [States containing swamp lands] to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said [States].
>
> SEC. 2. * * * It shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State, * * * and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent the fee simple to said lands shall vest in the said State.

The grant made by the first section of this statute was in terms absolute and unconditional, and it was not unreasonably held in *Railroad Co.* v. *Smith*, though with the dissent of Clifford, J., that the failure of the Secretary of the Interior to make a list and plats, and to perform the other duties imposed upon him in regard to the land by the second section, did not affect the completeness of the grant, and that evidence was admissible to show that any particular land was within the grant. In *French* v. *Fyan* this court affirmed the doctrine that the grant in the swamp-land act was one *in præsenti*, while holding that after the patent had issued no evidence as to the character of the land was admissible. Had the swamp-land act merely provided that lands ascertained by the Secretary of the Interior, or in accordance with

his regulations, to be swamp lands, should be granted to the States, there would have been some similarity between that act and section 61; but as it is the two are wholly dissimilar, and these cases have no bearing on the present issue.

In *United States* v. *American Tobacco Co.* (166 U. S., 468; see appellant's brief, p. 28), the statute under consideration required the redemption of tobacco stamps when destroyed or spoiled in all cases where the fact of such loss or destruction was satisfactorily proved, and the question was whether the Commissioner of Internal Revenue, under his general power to make regulations (for the statute conferred no power of regulation whatever), could in any case avoid redeeming the stamps if the fact of destruction or spoiling were proved. It was held that he could not; but that decision has absolutely no bearing upon the present case. Had section 61 provided for a rebate in all cases where the use of alcohol in the arts was satisfactorily proved, and the Secretary of the Treasury had refused to receive proof, then the *American Tobacco Co.* Case might have had some bearing, but as the only rebate promised was for a use under regulations—a regulated use—a wholly different question is presented.

The cases concerning regulations in regard to importation free of duty (*Balfour* v. *Sullivan*, 19 Fed., 578; *Pascal* v. *Sullivan*, 21 id., 496; *Siegfried* v. *Phelps*, 40 id., 660; *United States* v. *Mercadante*, 72 id., 46; *Bartram* v. *United States*, 77 id., 604; *United States* v. *Dominici*, 78 id., 334), cited in the appellant's brief, have no bearing on the present case. The laws in regard

to the free list do not require that the goods, while on their way from the point of shipment, shall be under supervision, or in any way subject to the regulation of the Treasury Department, but merely that on their arrival the fact that they are entitled to free entry shall be ascertained under regulations prescribed by the Secretary. Such a fact could of course be ascertained without any regulations at all, and it was properly held that regulations directed to that end can not be binding upon the courts. Appellant's brief (p. 31) asserts that *Bartram* v. *United States*, involved "a question identical in principle with that presented by the present case," yet the statute in the Bartram case, quoted on the very next page of the brief, merely requires "proof of the identity" of the articles imported to be made under regulation. In the present case the furnishing of proof by the claimant was but a small part of what the statute required, the actual use of the alcohol under regulations in the various manufacturing operations being the main thing required, and no analogous requirement is found in the Bartram case or others of its class, any more than in the Campbell case.

The cases of *United States* v. *Mann* (2 Brock., 1), *United States* v. *Bedgood* (49 Fed., 54), and *Anchor* v. *Howe* (50 id., 367), cited in the appellant's brief (pp. 34, 35), merely held that executive regulations must be reasonable, but this incontrovertible doctrine can not affect the question of whether a rebate granted for doing something under regulations can be claimed where the thing has not been done under regulations.

NO ANALOGY WITH PROVISIONS OF OTHER SECTIONS REQUIRING REGULATIONS.

The appellant's brief (p. 39) calls attention to the fact that thirty-nine other provisions of this same act of August 28, 1894, call for regulations by the Secretary of the Treasury, and in view of this fact it is contended that as there has been no difficulty in prescribing and enforcing adequate regulations in any of those cases, there can be no valid reason why the regulations called for by section 61 should not have been prescribed and enforced. The contention is ingenious, but overlooks the fact that the subject-matter of section 61 is distinctly different from that of any of the other sections or paragraphs which authorize regulations, as may be seen by a reference to them, which will be aided by a classification.

Class I. Provisions relating to the collection of customs duties and the free list:

Sugar, par. 182½, 2 Supp. R. S., p. 279.
Tobacco, par. 185, p. 280.
Wines, etc., par. 244, pp. 284–285.
Animals for breeding, par. 373, p. 297.
Cattle, etc., par. 373, p. 297.
Animals for exhibition, par. 374, p. 297.
Emigrants' teams, par. 374, p. 297.
Casks, etc., par. 387, p. 297.
Books, etc., for schools, etc., par. 413, p. 299.
Indian goods, par. 582, p. 303.
Theatrical scenery, par. 596, p. 304.
Works of art, etc., by Americans, par. 686, p. 307.
Works, of art, etc., of professionals, par. 687, p. 307.
Works of art, etc., for exhibition, par. 688, p. 307.
Cigars, sec. 26, p. 314.

All the above provisions relate either to the ascertainment of the duty which is to be paid upon imported articles, or the ascertainment of whether an article is free or dutiable, or, in the case of section 26, the method of collecting the duty. All such matters necessarily come under the general head of the collection of revenue from customs, the expense of which is provided for by a permanent appropriation. These provisions involved nothing new, and there was ample power to enforce such regulations as were called for.

Class II. Provisions relating to importation or manufacture in bond, or withdrawal from bond free of tax:

Shipbuilding materials, sec. 7, 2 Supp. R. S., p. 309.

Articles for repair of ships, sec. 8, p. 309.

Manufacturing in bond, sec. 9, p. 309.

Machinery for repair, to be exported, sec. 13, p. 311.

Smelting works as bonded warehouses, sec. 21, p. 312.

All the above provisions, except that in regard to manufacturing in bond, relate also to the collection of revenue from customs, because until final exportation the various articles in bond are liable to duty, and hence must necessarily remain under the control of the Treasury Department for the protection of the revenue.

As to manufacturing in bond, materials subject to customs duty or internal-revenue tax may be used in manufacturing bonded warehouses, but the expense of maintaining that system has always been borne by the manufacturers under express statutory provision, and

this section 9 is no exception to the rule in this respect. There can therefore be no question as to the power of the Secretary to enforce all necessary regulations as to this class.

Class III. Provision as to drawbacks on imported materials. (Sec. 22, 2 Supp. R. S., p. 313.)

Drawbacks have been a feature of the customs system of the United States from the start, and the determination of the amount of drawback to be allowed has from the start been intrusted to officers of the customs service For this reason, apparently, in the expenditure of the permanent appropriation for the collection of revenue from customs—which dates from 1849 (9 Stats. 398), the expense having previously been met chiefly by a fee system—no distinction has ever been made between expenses incidental to the drawback system and those which concerned the collection of revenue in the strict sense of the term. This long-established practice has prevented any question as to the power of the Secretary to enforce drawback regulations. Moreover, the drawback statutes grant the drawback in express terms, leaving to the officers of the Treasury only such duties as concern the ascertainment of the amount of drawback to be allowed.

Class IV. Provisions as to collection of internal revenue:

Income tax, sec. 34, 2 Supp. R. S., p. 320.
Playing cards, sec. 38, p. 323; sec. 43, p. 324.
Distilled spirits, sec. 49, p. 326; secs. 51, 54, 55, p. 328; sec. 66, p. 331.
Tobacco, sec. 69, p. 332.

The regulations authorized by these provisions all concern the collection of revenue, so that the cost of enforcing them is met by the appropriation for the collection of revenue, and no question as to the power to enforce those regulations can arise. This is true even in the case of the exportation of playing cards, because until actually exported they are subject to tax.

Class V. Miscellaneous provisions.

The recording of trade-marks (sec. 6, 2 Supp. R. S., p. 308) obviously comes within the work of the office of the Secretary of the Treasury, the appropriation for which is not restricted to the collection of revenue.

The prohibition of importation of neat cattle, under sec. 17 (p. 312), and the prohibition of articles made by convict labor, under sec. 24 (p. 314), are matters which, as far as the Treasury Department is concerned with them, are necessarily attended to by the officers employed at the custom-houses along with their other duties. The Department of Agriculture, and not the Treasury, is charged with the inspection of cattle arriving from any foreign country. *Act of August 3, 1890*, §§ 6–10 (26 Stats., 414).

Such neat cattle as are imported are subject to duty, so that regulations in regard to such importation are literally regulations for the "collection of revenue from customs," while even in regard to the exclusion of cattle, hides, and convict-made articles, or the importation of hides, which are on the free list, the enforcement of the Treasury regulations does not require the appointment of any officers for this special purpose, but is merely incidental to general custom-house work.

In every one of the cases cited by claimant's counsel, therefore, no question as to the power to enforce regulations can arise, because the matters to be regulated were all matters for whose efficient regulation the Secretary of the Treasury was invested with adequate power, including the power to employ and pay subordinates. In the case of section 61, on the contrary, no power to employ and pay subordinates for the enforcement of the regulations was either granted by the act itself or existed under any previous law.

NO CONCLUSIVE PRESUMPTION THAT SECTION 61 WAS INTENDED TO BE, FROM THE FIRST, OPERATIVE IN ANY EVENT.

Appellant's counsel (brief, pp. 48, 55) object that the construction put upon section 61 by the court below renders it ineffective, and that "an interpretation is always to be preferred by which an act is to be made effective." While the latter statement is true as a general rule, it does not follow that a court *must* construe every section of a statute so as to make it operative as long as it is on the statute book, no matter what its language may be. In the interpretation of statutes there is no conclusive presumption that they are operative in every part. Inoperative laws are rarely passed, yet it is not wholly unprecedented, even in the case of acts of Congress, for a law to be on the statute book and yet to be wholly inoperative, either from the date of its enactment or from some subsequent time, because of a lack of appropriation to provide the machinery necessary for its execution.

The *Act of March 3, 1871*, section 9 (16 Stats., 514), provided as follows:

> That the President of the United States be, and he is hereby, authorized to prescribe such rules and regulations for the admission of persons into the civil service of the United States as will best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose the President is authorized to employ suitable persons to conduct said inquiries, to prescribe their duties, and to establish regulations for the conduct of persons who may receive appointments in the civil service.

Although this section related to a matter of vast importance, and for which Congress now appropriates directly more than $100,000 a year, not including the item of printing and binding, nothing could be done in regard to it without an appropriation, and hence the *Act of April 20, 1871* (17 Stats., 7), appropriated $10,000 for the current fiscal year and that of 1871–72, as follows:

> To enable the President to carry out the provisions of the act of March third, eighteen hundred and seventy-one, authorizing him to prescribe rules and regulations for the admission of persons into the civil service, and so forth, ten thousand dollars.

For the year 1872–73 the *Act of May 8, 1872* (17 Stats., 83), appropriated as follows:

> To enable the President of the United States to perfect and put in force such rules regulating the civil service as may from time to time be adopted by him, twenty-five thousand dollars.

The *Act of March 3, 1873* (17 Stats., 530), reappropriated any unexpended balance of the previous appropriation, but thereafter no further appropriations for this purpose were made, and it is a matter of history that with the cessation of appropriations the civil-service law of 1871, from which so much had been expected in the way of reform, became wholly inoperative, although it remained on the statute book as section 1753, Revised Statutes, so that in so far as it has not been superseded by the *Act of January 16, 1883* (22 Stats., 403, see sec. 7), it is in force to-day, having been brought into operation again by the operation of that act, for which the necessary appropriations have always been made.

Another illustration of a law inoperative for lack of appropriation is furnished by the board of health act of March 3, 1879 (20 Stats., 484). Various appropriations were made for the cost of carrying out this act, down to and including the appropriations of March 3, 1885 (23 Stats., 478, 496), for the fiscal year 1885–86, but thereafter there was no further such appropriation except that of August 4, 1886 (24 Stats., 256, 289), supplying a trifling deficiency for 1885–86. In *Dunwoody* v. *United States* (143 U. S., 578) this court held that although there was no express statutory limitation of time to the life of the act, the terms of the various appropriation acts "evince the purpose upon the part of Congress not to create any liability upon the part of the United States, in respect to the work of the National Board of Health, beyond the amounts specifically appropriated by it from time to time for that work," so that no officer or employee of the board had any legal right, by virtue of any implied contract, to

compensation for services rendered after the expiration of the period for which there was an appropriation for such services.

The National Board of Health act remained on the statute book, but simply became inoperative for lack of appropriation, and in the Supplement to the Revised Statutes (p. 261), published five years after the last appropriation had expired, the late Chief Justice of the Court of Claims gave the act in full, except some expired sections, adding the note that "Congress having ceased for several years past to appropriate for the current salaries and expenses of the National Board of Health, it is no longer in active operation, though never expressly abolished."

Another instance of an inoperative law is found in the *Act of March 5, 1888* (25 Stats., 44). This act authorized and directed the Secretary of War to purchase a certain specified piece of ground, with the building thereon, and to cause to be erected thereon another building of a specified character, for the use of the Signal Bureau, the price to be paid for the property, and the cost of the new building, not to exceed certain specified sums. The Attorney-General, on March 22, 1888, gave an opinion that no money could be paid for the purchase of the property, because the act made no appropriation for that purpose. (19 Opins., 131.) The *Act of April 24, 1888* (25 Stats., 90), appropriated the necessary funds, but it is clear that had Congress delayed to appropriate, the first act could not have been carried into effect at all, and that from March 5 to April 24 it was in fact wholly inoperative.

The *Dunwoody* Case, above cited, deciding that where an appropriation is required in order to carry a law into effect, but has not been made, no legal rights can arise from anything done under that law, lays down a doctrine which is precisely applicable to the present case. If anything, the appellant's position was stronger in the *Dunwoody* Case, because the act of March 3, 1879, had been operative for several years before the last appropriation made for its operation had expired, and Dunwoody had been lawfully appointed under it, and had performed services for which he had been paid out of the appropriations. Yet when the last appropriation expired, his rights expired with it, and his status was the same as if no money had ever been appropriated for the purposes of the act, but he had been appointed and had performed services. Had Congress at first made an appropriation for enforcing the Secretary's regulations under section 61, but had failed to renew it at the close of the fiscal year, the appellant would have been in precisely the same situation as Dunwoody; and that Congress never made any such appropriation at any time can not, at all events, give the appellant any greater rights than he would have had in the case supposed.

In the present case it should be remembered that the construction which the court below has put upon section 61 did not make it necessarily inoperative under all circumstances, but only during such time as regulations were not prescribed, or, to look at it practically, during such time as the Secretary of the Treasury was unprovided with funds for enforcing regulations. Had Congress appropriated the money, then the section would

have become operative as soon as the necessary force of men could be secured.

APPELLANT NEVER COMPLIED WITH THE STATUTE.

Appellant's counsel insist (Brief, p. 48) that "the right [to rebate] is perfect on claimant's compliance with the statute." Had the appellant so complied, no objection could be made to this statement; but it is submitted that he not only never did so, but that it is uncertain whether he ever would have done so had the opportunity ever been given him. Compliance with the statute meant use of alcohol in compliance with the regulations, and until those regulations were prescribed it was uncertain whether he would find it desirable to comply with them or not. In order to show compliance counsel find it necessary to alter the statute by omitting its vital words. They analyze the section and find that there are five requirements. If such analysis were rightly made, the first requirement would manifestly be this:

> 1. The manufacturer finding it necessary to use alcohol in the arts may use the same *under regulations to be prescribed*.

Such a requirement, however, conflicts with the argument of appellant's counsel, who proceed to tone down the too-decided language of the statute by omitting the reference to the regulations. A similar toning down is apparently seen in their treatment of the third requirement, which should read:

> 3. The collector of internal revenue of the proper district is to be satisfied of compliance with the regulations and with the use of the alcohol *therein*, i. e., in the arts under regulations.

The word "therein" is restrictive as to the use of the alcohol, and the restriction may most properly be understood as in regard to the character of the use, but it is precisely this character of the use which appellant's counsel failed to see the importance of. Thinking it unimportant, they consider that the statute may be read as if its language were—

> Any manufacturer finding it necessary to use alcohol in the arts may do so, and the Secretary of the Treasury shall prescribe regulations in regard to such use, and the manufacturer, on satisfying the collector, etc.

A sufficient answer to the contention on pages 48 to 51 of the appellant's brief is that it involves a change in the language of the statute.

NO REBATE OF TAXES PAID BEFORE THE ACT OF AUGUST 28, 1894, BECAME A LAW IS WARRANTED BY SECTION 61.

The present suit is for $2,344.40 paid as spirits tax before August 28, 1894, as well as for $4,900.81 paid after that date. It is submitted that even if the former amount had been paid on alcohol which was afterwards used in the arts, etc., under regulations prescribed by the Secretary of the Treasury, no rebate of that amount would have been authorized by section 61. A refund of taxes paid before the passage of the act of August 28, 1894, would involve a retrospective operation of section 61, not warranted by its language or purpose.

The distinction between prospective and retrospective legislation has been well stated, as follows:

> As the terms are commonly used in the law, prospective legislation is such as provides rules for facts thereafter to transpire; retrospective, for those which have partly or fully occurred. Prospective interpretation restricts the application of the new law to facts arising after its enactment; retrospective applies it to the past and present facts as well as the future. (Bishop, Written Laws, section 83.)

If this distinction be borne in mind, it will be clear that the appellant, in making claim for a refund of taxes paid before August 28, 1894, upon alcohol used by him, seeks to make section 61 operate retrospectively upon alcohol already taxed and upon taxes already paid. Under that section the payment of a tax upon alcohol is a most essential fact, and if such payment took place before August 28, 1894, it was on that day "a past fact"—one which had "fully occurred." That the section should operate only upon alcohol used after that date is not enough to render it fully prospective. To make it operate upon alcohol taxed or taxes paid before that date, would be to make it operate retrospectively—to give to a payment already made an effect which it did not have at the time it was made.

It is a very familiar rule of law that unless the legislature has either explicitly declared by the use of unmistakable words its intention that a statute should operate retrospectively, or unless such intention clearly appears by a necessary implication from the provisions of an act,

no construction which will make an act operate retrospectively can be allowed. (See Black on Interpretation of Laws, p. 250, and cases there cited.) Among the numerous authorities on this subject a few may be selected as especially analogous to the present case.

In *United States* v. *Heth* (3 Cr., 399) it was held that the words—

> there shall, from and after the 30th day of June next, be allowed to collectors, etc., two and a half per centum on all moneys which shall be collected and received by them for and on account of the duties arising on goods, wares, and merchandise imported into the United States—

referred only to importations after June 30, and not to moneys collected after that date on goods imported prior thereto.

A State statute authorizing the registry of deeds proved or acknowledged in other States does not refer to deeds previously so proved or acknowledged, even though registered after the statute was passed. (*McEwen* v. *Den*, 24 How., 242.)

The *Act of May 6, 1882*, section 4 (20 Stats., 59), requiring a Chinese laborer to produce a certificate as the "only evidence permissible to establish his right of reentry" into the United States, does not apply to laborers formerly residing in this country who left it prior to the passage of the act, but returned afterwards. (*Chew Heong* v. *United States*, 112 U. S., 536.)

It is a corollary of the above rule that if the words may be so understood as to make it operate either prospectively or retrospectively, the former operation only

shall be allowed. (*Dyer* v. *Belfast*, 88 Me., 140; *Gaston* v. *Merriam*, 33 Minn., 271; *State* v. *Connell*, 43 N. J. Law, 106; *Lydecker* v. *Babcock*, 55 id., 394.)

In the present case not only do the words of the section fail to express any intention to allow a refund of taxes paid prior to its enactment, but such retrospective operation would not be in harmony with the purpose of the act as a whole. The word "tax" occurs only twice in the section, where mention is made of "the stamps which show that a tax has been paid thereon," and of "a rebate or repayment of the tax so paid." What tax is here referred to? Evidently, the only tax on alcohol referred to in the rest of the act, viz, the tax imposed by the act, at the rate of $1.10 per proof gallon, in section 48, and referred to in the thirteen sections preceding and the seven sections following this section 61. Had Congress intended to refer to any other tax than that levied by this act it would certainly have done so, and it could very easily have done so by merely adding words to express an intention to grant a rebate of taxes already paid. It has not done so, and to read such words into the section would be the extreme of judicial legislation.

It is no answer to this to contend, as was done in the court below, that there is a contract "between the Government and the manufacturer who uses the alcohol," that "the promise is that if he uses the alcohol in the arts he shall receive a rebate of the tax." The question is, What tax is to be repaid? And the answer must be, The tax imposed by the act, and not some other tax, imposed by some other act.

Moreover, the act was a revenue measure, designed to readjust the burdens of taxation, to impose certain taxes, to remove certain other taxes previously imposed, and to define the sources from which and the rates at which money should thereafter be collected for the use of the Government. It had nothing to do with the disposition to be made of money already in the Treasury. Congress decided that in future alcohol should be taxed at $1.10 per proof gallon, but that when it was used in the arts or in any medicinal or other like compound, under certain regulations, the tax paid thereon should be refunded. The object of the refund was practically to relieve from taxation the alcohol so used.

To have provided for a rebate on alcohol already taxed would have been to go outside the sphere of a revenue act in order to provide for the expenditure of public funds already in hand, and even, it would seem, to do so by way of a gratuity. This would have been wholly inconsistent with the plain purpose of the act itself. To assume that Congress so intended is to assume that it intended to single out of the prior tax law one feature which it considered undesirable, and to refund the tax to the parties affected thereby, after that law had ceased to operate, but as long as the material already taxed by it remained unused, without undertaking, however, to correct the results of any other feature of such prior law. Such an assumption is impossible. There was no more reason to refund the alcohol tax to manufacturers than to refund the taxes on wool, lumber, paintings, statuary, or any other articles placed on the free list, to the users of those articles.

To make the operation of section 61 wholly prospective, as Congress clearly intended to do, inflicted no hardship on the manufacturers. They were promised, upon certain conditions, a rebate of the internal-revenue tax levied upon alcohol by this act. This promise did not extend to alcohol taxed under the law previously in force, any more than to foreign alcohol upon which an import duty had been paid. If for a time the appellant failed to procure the alcohol to which the promise extended, he can not ask for judicial legislation to help him out. It was contended in the court below that it would be "an absurd consequence" of section 61 if the buyer of alcohol taxed before August 28, 1894, could obtain no rebate of the tax, although had he bought alcohol taxed after that date he could have had a rebate. This is no more "absurd" than the undeniable fact that the act of 1894 legislated money directly into the pockets of distillers, because the previously taxed alcohol brought the same price after the new tax rate had been established as if it had been taxed at that rate. The law which has not some consequences that someone might call absurd has probably not yet been enacted.

The opinion of the Solicitor-General in the copyright case (21 Op. Atty. Gen., 159), cited in the court below, is not in conflict with what has been stated above. The Solicitor-General held that the owner of a copyright of a book "copyrighted in accordance with the requirements of" the act of March 3, 1891, though before its passage, was entitled to the benefit of that act. Had the first 30 barrels of alcohol involved in the present case been taxed "in accordance with the requirements

of" the act of August 28, 1894, including the rate required by that act, then undoubtedly the claimant would have been as much entitled to the benefits of that act upon those barrels as upon the balance. The fact that it would have been impossible, before the passage of a law, for an article to be taxed at a rate which was first established by that law, shows the difference between this case and that which was before the Solicitor-General. That opinion concerned copyrights obtained by citizens of the United States whose books were printed from type set within the United States, or from plates made therefrom, conditions which could exist just as well before the passage of the act of March 3, 1891, as afterwards. In such cases the requirements of that act had been complied with as well as those of the law previously in force. Under the previous law, however, persons not citizens of the United States could not obtain copyrights at all, and hence could not comply with the requirements of the act of March 3, 1891, before its passage, so that the opinion had no reference to them. Alcohol taxed before August 28, 1894, could no more be taxed "in accordance with the requirements of" the act of that date than foreigners could, before March 3, 1891, obtain copyrights "in accordance with the requirements of" the act of that date. Hence, in the present case, the analogy is with the latter class of persons, and not with those referred to in the opinion.

The attempt to extend the operation of section 61 of the act of August 28, 1894, to alcohol taxed under the law previously in force is, of course, a minor feature of

the present case, but it serves well to illustrate the extraordinary theory of statutory construction upon which this claim is based. When once the sound and well-recognized rules of construction are departed from, and a rebate is claimed under conditions excluded by the plain language of the section, it is but going one step farther to claim that the section was retrospective, though containing not one word to warrant such a construction.

It is submitted that the judgment of the court below should be affirmed.

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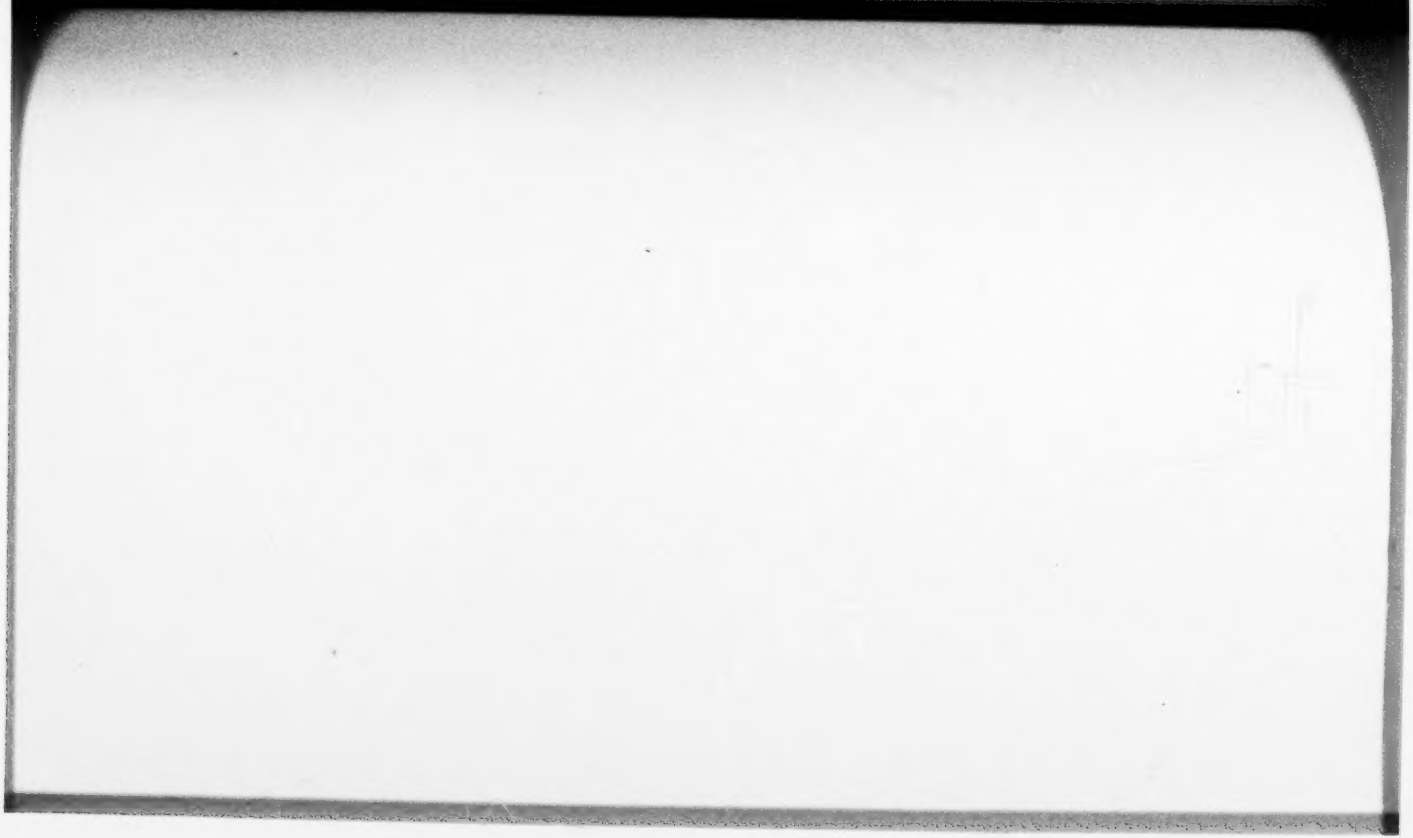

No. 218.

Supp. Brief of Atty Gen'l for U. S.

Filed Nov. 29, 1898.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

ROBERT DUNLAP, APPELLANT,
v.
THE UNITED STATES. } No. 218.

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

CHARLES C. BURLEY,
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SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

Since the filing of the brief for the United States the counsel for appellant have presented a brief in reply, discussing certain features of the case. Much of this matter is sufficiently discussed in the brief for the United States, but some points seem to require a short statement in elaboration of the position of the United States.

1.

When the right to manufacture under section 61 began.

Appellant's counsel (reply brief, pp. 2–4) fail to realize the difference between the taking effect of the act of August 28, 1894, and the coming into existence of the

right to manufacture under section 61 of that act. Undoubtedly the act went into effect on the day when the time allowed by the Constitution for the President's action upon it expired, viz, August 28, 1894, and on that day it became the duty of the Secretary of the Treasury to take whatever steps lay in his power to arrange for carrying into operation the provisions of section 61 at the earliest possible date; but it does not at all follow that every manufacturer who used alcohol on that day and preserved his stamps was entitled to a rebate. Appellant's counsel, however, insist that every manufacturer was so entitled, and they are necessarily driven to that position in spite of its manifest unreasonableness. The brief for the United States (p. 11) offered them the choice of either horn of the dilemma—a right to rebate for all alcohol used in the arts, etc., from the moment the act became a law, or a right depending upon a use under regulations; and they are compelled to choose the former.

Their position, then, is that although the act took effect on August 28, 1894, and provided for regulations *to be* prescribed, and although it would have been clearly impossible to prescribe any effective regulations for some time thereafter, the use of alcohol in manufacturing on that day involved the right to rebate; or in other words, that Congress *intended* that for a certain period of time the unregulated use of alcohol in the arts, etc., should entitle the manufacturer to a rebate.

They seek, indeed, to make their position less glaringly unreasonable by saying that during the ten days that the President held the bill "the Treasury Department had an opportunity to prepare for putting all its provisions

into effect." Were the United States no larger than the Republic of San Marino, perhaps ten days would have sufficed, but the question is not whether ten days were enough, but what Congress intended by the words "under regulations *to be* prescribed." Congress did not intend that ten days should elapse after it passed the bill before it became a law, for that was a matter about which it could have no intention, one way or the other, the Constitution having left the matter wholly to the President. If the President had signed the bill the day of its passage, there would have been no interval of ten days, yet the language and the meaning of section 61 would have been the same, viz, as appellant's counsel contend, that an immediate right to rebate was granted for all use of alcohol in manufactures, even though a use "under regulations" would be impossible for some time, provided only the stamps were preserved and the collector was satisfied that the alcohol was used.

It seems superfluous to add that until the act became a law it was not the Secretary's duty to obey it, and that the act could not possibly have intended that the regulations were to be prescribed, or anything done in regard to them, until the act itself took effect.

2.

The possibility of unreasonable regulations.

Appellant's reply brief contends (pp. 4-6) that if the Secretary, though ostensibly undertaking to carry out section 61, had attempted to unduly restrict its scope and to exclude from its benefits persons who were really

entitled thereto, such persons would have been without remedy unless the section be so construed as to allow of a rebate for alcohol not used under regulations. It is assumed that the restrictive definition of "manufacturer" in the proposed regulations (Rec. 10) would have been finally adopted and would have excluded the appellant. This latter it certainly would not have done, he being a *manufacturer* for wholesale only, within any standard definition of the word "wholesale" (though it is true the record is silent as to this, the definition not having been adopted); but even if anyone had been improperly excluded by an unreasonable interpretation of the word "manufacturer," he would not have been without a remedy. While the framing of the necessary regulations may not have been a ministerial act, their execution would undoubtedly have been ministerial, and hence the acceptance of the bond, inspection of the premises, grant of a license, and assignment of an officer, if provided for by the regulations, could all have been compelled by mandamus, and any manufacturer unjustly discriminated against by the Secretary of the Treasury or the Commissioner of Internal Revenue would have had a right of action against those officers for the damages caused by their official nonfeasance or misfeasance, mistake or honesty of intention being no defense. (*Amy* v. *Supervisors*, 11 Wall., 136; Mechem on Public Officers, § 664.) When the law makes public officers personally liable for their official acts, and also provides for their impeachment, the rights of the citizen are sufficiently protected against official oppression. No government guarantees its citizens against loss by official

misconduct, and the bare possibility of loss from such misconduct is not a reason for interpreting a statute in defiance of the plain meaning of its words.

3.

The authority of United States v. McLean.

Appellant's brief in reply (p. 7) refers to *McLean* v. *Vilas* (124 U. S., 86) as "overruling the position taken in the original *McLean case*," i. e. *United States* v. *McLean* (95 U. S., 750). As stated in the brief for the United States (p. 13), the decision in *McLean* v. *Vilas* was merely to the effect that the suggestion of the court in *United States* v. *McLean*, that "if the executive officer failed to do his duty, he might have been constrained by a *mandamus*," did not apply in that particular case, no failure of duty being shown. The doctrine of *United States* v. *McLean* was not "departed from," but remained unshaken, was followed in *United States* v. *Verdier* (164 U. S., 213), and is clearly applicable to the present case. That this doctrine was announced "with apparent regret" may be true, but the court did not allow the hardness of the case to impair the law.

4.

The British practice as to methylation.

Appellant's brief in reply (p. 11) adverts to British experience under 43 and 44 Vict., c. 24, which is stated to be "similar" to section 61. The British system differs *in toto* from that contemplated by section 61. Under the former alcohol is withdrawn free of tax, methylated under supervision, in large quantities at a time, and then sold

for any purpose whatever, provided it be not afterwards subjected to demethylation, the practicability of which is disputed. Obviously the number of methylators is very small as compared with the users of methylated spirits, even in manufacturing, and the industrial use of methylated spirits is much more restricted than that of pure alcohol; hence it is not surprising that the supervision of occasional methylation is a comparatively small affair. Section 61 provides for the use of pure alcohol, not methylated spirits, and its use by manufacturers, not by methylators. It does not permit a rebate in the case of methylation by one man and the purchase of the methylated spirits by another man for use in manufacturing. If the regulations had required methylation where feasible, each manufacturer would have had to do this for himself, so that practically the same amount of supervision would have been required as where the alcohol was used pure. In the one case the methylation would have been supervised, and in the other the manufacturing operations.

The experience in a compact country like Great Britain, under a law of limited application, is obviously no criterion for what would be involved in applying the very broad provisions of section 61 throughout the length and breadth of the United States.

5.

Section 61 required precautions before and during the use of the alcohol.

The reply brief contends (pp. 12–14) that supervision of the use of alcohol under section 61 could not have

been intended, because the necessity of satisfying the collector, as to the use of the alcohol, would have proved a sufficient protection against fraud. Had Congress so thought, it would have been easy to simply provide that any manufacturer who satisfied the collector that he had used alcohol in the arts or in any medicinal or other like compound, should receive the rebate. Such a provision would have avoided all trouble, provided it was practicable, which it certainly would not have been. To supervise the actual use of alcohol by manufacturers throughout the United States would have required the constant employment of a number of men, but to receive, from private and interested parties, convincing evidence of the same use, after it had taken place, would probably have required a greater number of days' work on the part of collectors and deputy collectors, whose numbers could not be increased without authority from Congress. As a general rule, the quickest way to know that a thing is done is to see it done; to receive proof of it afterwards takes much longer.

In point of fact, section 61 provides that the collector is to be satisfied of two things, viz, compliance with regulations and use of alcohol. Were he not required to be satisfied that the regulations had been complied with, it might be argued that the use of the alcohol was really all that need be proved in any event, but the fact that he is to be satisfied of compliance with the regulations shows that the mere use is not all. The language of the statute shows that the use of the alcohol is one thing, and the compliance with the regulations another, the latter being, in fact, the *proper* use of the alcohol, i. e., its use under such

circumstances as insure that the claim for rebate is a proper one, or, in other words, that no portion of the alcohol has been or can be used for any other purpose than those contemplated by the section, or has been or can be the subject of any other claim for rebate. The provision that the collector was to be satisfied that the alcohol had been used seems to relate to proof of the amount of alcohol for which claim is made, a comparatively simple matter; but the provision that he was to be satisfied that the regulations had been complied with relates to the character of every detail of the use of the alcohol, a much more difficult matter to ascertain with certainty, unless from contemporaneous and disinterested sources, i. e., from the reports of persons charged with official supervision. Apparently, in providing that collectors were to be satisfied that the regulations had been complied with, Congress intended that they should pass upon the reports of the officers who supervised the use of the alcohol, for, in view of the manifold duties of collectors, more than this could not possibly have been contemplated.

6.

No analogy to the drawback system.

Appellant's counsel (Brief in reply, pp. 14–17) again advert to the system of drawbacks on alcohol on exportation, and the ease with which the system is operated. Drawbacks are allowed on *the alcohol in a manufactured article* when exported, a comparatively easy matter to ascertain. The amount of alcohol used in the manufacture of the same article would be much more difficult of proof, and it would be still more difficult to ascertain the

amount used, when none of it remained in the manufactured article. The court has ascertained that, in the present case, from the evidence presented, but at a considerable expenditure of its own time, as well as of that of counsel and witnesses. It was to simplify the evidence of the use, as well as to secure the United States against fraud, that Congress required a use "under regulations."

7.

The statutes against fraud.

Appellant's brief, in reply (pp. 17–19), calls attention to the numerous penal statutes in regard to evasions of the spirits tax, and concludes with the statement that "attempts to commit fraud under section 61 could not have escaped one or more of these penalties."

It is very probable that if section 61 had been put into operation, some attempts to obtain rebate without a *bona fide* use of the alcohol would have been detected and punished; but if it is meant to be contended that the penal laws in regard to the spirits tax would would have effectually taken the place of direct supervision of the use of the alcohol in the arts, etc., so as to prevent payments of rebate in any case where the alcohol had not been properly used, or could afterwards have been recovered and put to other uses, the contention is utterly without foundation. The inducement to make money by obtaining a rebate for more alcohol than had actually been used in manufacturing, or by recovering the alcohol and using it for other purposes after the rebate had been paid, would have been precisely as strong as the inducement to avoid payment of the tax in

the first instance, and what that is at the present day, in spite of all the precautions taken by the Bureau of Internal Revenue, may be gathered from the Commissioner's Report for 1897 (pp. 22-25). It appears that in the year 1896-97, 95 registered distilleries were reported for seizure on account of fraudulent practices, 2,273 illicit stills were seized, 829 persons arrested, one revenue officer killed and three wounded, and that the number of stills seized in the nine preceding years had been as follows: In 1888, 518; 1889, 466; 1890, 583; 1891, 795; 1892, 852; 1893, 806; 1894, 1,016; 1895, 1,874; 1896, 1,905.

It is undoubtedly true that most of these illicit stills were in the wilder portions of the Southern States, yet 1 is reported from the first New Jersey district, 1 from New Hampshire, 6 from the districts of New York, and 1 from Ohio. Moreover, the Commissioner reported, "the seizure of illicit stills within the last few years has greatly increased. This matter should receive serious consideration." And his statement was certainly justified, as the seizure of 1,905 stills in 1896 did not prevent the existence of 2,273 illicit stills to be discovered and seized in 1897. How many attempts to defraud the revenue were successful and are not reported is conjectural, but manifestly the success of the revenue agents in discovering evasions of the law is very far from being complete.

While the fact that claims under section 61 would have had to be based on manufacturing operations would have tended to prevent frauds from being carried on under the same geographic conditions which existed in

those parts of the country where most of the illicit distilling takes place, yet the extent to which fraudulent evasions of the spirits tax are committed measures in some degree the force of the temptation; and that the temptation would be any weaker under section 61, so as to allow a relaxation of the vigilance of the revenue officers in regard to the use of alcohol in manufactures, can not be asserted with any confidence. In any event, Congress having contemplated the granting of a rebate for alcohol used in manufacturing under regulations, it can not be supposed that Congress intended to trust to the enforcement of penal laws after the manufacturing had been done, instead of to regulation during the actual process of manufacture.

8.

History of section 61.

The reply brief (p. 26) points out that the House of Representatives only raised the spirits tax to $1 a gallon, not to $1.10. This fact, however, does not indicate any greater concern for the interests of manufacturers than for those of other users of alcohol. The House did raise the tax from 90 cents to $1, and as the rebate system was not one of the reductions of taxation which the House proposed, it can not have been regarded by that body as within "the general purposes of the act of 1894." (See Appt.'s Brief, p. 4.) The further statement that "the rate of $1.10 was throughout coupled with the remission of tax on alcohol used in the arts" is misleading. It is true that when the Senate passed the bill both changes had been made, but the change in rate was

made first by the Committee on Finance, and without any reference to the rebate amendment, which was offered in Committee of the Whole, by a member of the minority, three months after the Committee on Finance had reported the bill, and entirely independently of the action of that committee. (See 26 Cong. Rec., 3126, 6936, 6956.)

9.

The general power of the Secretary as to regulations.

It is contended (Brief in reply, p. 27) that the Secretary of the Treasury could have made all necessary regulations for a rebate system by virtue of the general power vested in him by Revised Statutes, § 251, and that therefore the requirement of regulations in section 61 was practically unnecessary. Assuming the correctness of the premises, they certainly do not warrant the conclusion. If there could have been regulations without any reference to them in section 61, the grant of a right to rebate could not possibly have been made subject to compliance with, or previous existence of, regulations; but the fact that that section required the use of the alcohol to be "under regulations to be prescribed" shows a very positive intention not to grant the rebate with or without regulations, but to insure their existence before the right to rebate could exist.

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